DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-525
Title: Janus Capital Group, Inc., et al., Petitioners
v.
First Derivative Traders
Docketed: November 2, 2009
Linked with 09A95
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (07-1607)
Decision Date: May 7, 2009
Rehearing Denied: June 2, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 23 2009	Application (09A95) to extend the time to file a petition for a writ of certiorari from August 31, 2009 to September 30, 2009, submitted to The Chief Justice.
Jul 24 2009	Application (09A95) granted by The Chief Justice extending the time to file until September 30, 2009.
Sep 4 2009	Application (09A95) to extend further the time from September 30, 2009 to October 30, 2009, submitted to The Chief Justice.
Sep 8 2009	Application (09A95) granted by The Chief Justice extending the time to file until October 30, 2009.
Oct 30 2009	Petition for a writ of certiorari filed. (Response due December 2, 2009)
Dec 2 2009	Brief of respondent First Derivative Traders in opposition filed.
Dec 16 2009	DISTRIBUTED for Conference of January 8, 2010.
Dec 17 2009	Reply of petitioners Janus Capital Group, Inc., et al. filed. (Distributed)
Jan 11 2010	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 19 2010	Brief amicus curiae of United States filed.
Jun 1 2010	DISTRIBUTED for Conference of June 17, 2010.
Jun 1 2010	Supplemental brief of petitioners Janus Capital Group, Inc., et al. filed. (Distributed)
Jun 21 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 28 2010	Petition GRANTED.
Jul 14 2010	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including September 3, 2010.
Jul 14 2010	The time within which to file respondent's brief on the merits is extended to and including October 26, 2010.
Jul 14 2010	Counsel for petitioners agrees to file any reply brief on the merits on or before November 19, 2010.
Jul 16 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioners.
Aug 31 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Sep 3 2010	Joint appendix filed. (Statement of costs filed)
Sep 3 2010	Brief of petitioners Janus Capital Group, Inc., et al. filed.
Sep 7 2010	SET FOR ARGUMENT ON Tuesday, December 7, 2010.
Sep 10 2010	Brief amicus curiae of Center for Audit Quality in support of neither party filed.
Sep 10 2010	Brief amicus curiae of Securities Industry and Financial Markets Association filed.
Sep 10 2010	Brief amici curiae of G. Eric Brunstad, Jr., Robert W. Helm, and Jane A. Kanter filed.

Sep 10 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Sep 10 2010	Brief amicus curiae of Attorneys' Liability Assurance Society, Inc., A Risk Retention Group filed.
Sep 27 2010	Record received from Court of Appeals for 4th Circuit. (1 envelope) (There are sealed documents in this record.)
Oct 8 2010	CIRCULATED
Oct 26 2010	Brief of respondent First Derivative Traders filed. (Distributed)
Nov 2 2010	Brief amici curiae of AARP and North American Securities Administrators Association, Inc. filed. (Distributed)
Nov 2 2010	Brief amicus curiae of United States filed. (Distributed)
Nov 2 2010	Brief amici curiae of Law Professors William A. Birdthistle, et al. filed. (Distributed)
Nov 2 2010	Brief amici curiae of John P. Freeman and James D. Cox filed. (Distributed)
Nov 2 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 2 2010	Brief amicus curiae of Council of Institutional Investors filed. (Distributed)
Nov 2 2010	Brief amicus curiae of Employees' Retirement System of the Government of the Virgin Islands filed. (Distributed)
Nov 2 2010	Brief amici curiae of New York State Common Retirement Fund, et al. filed. (Distributed).
Nov 15 2010	Record for the U.S.D.C. for District of Maryland is electronic.
Nov 19 2010	Reply of petitioners Janus Capital Group, Inc., et al. filed. (Distributed)
Nov 23 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 7 2010	Argued. For petitioners: Mark A. Perry, Washington, D.C. For respondent: David C. Frederick, Washington, D.C.; and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is no aiding-and-abetting liability in private actions brought under Section 10(b) of the Securities Exchange Act of 1934. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Thus, a service provider who provides assistance to a company that makes a public misstatement cannot be held liable in a private securities-fraud action. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008). In the decision below, however, the Fourth Circuit held that an investment adviser who allegedly "*helped* draft the misleading prospectuses" of a different company, "by *participating* in the writing and dissemination of [those] prospectuses," can be held liable in a private action "even if the statement on its face is *not* directly attributed to the [adviser]." App., *infra*, 17a–18a, 24a (emphases added). The questions presented are:

1. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Fifth, Sixth, and Eighth Circuits—that a service provider can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" another company's misstatements.

2. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Second, Tenth, and Eleventh Circuits—that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Craig Wiggins was a plaintiff in the district court. Mark B. Whiston, Loren M. Starr, and Gregory A. Frost were defendants in the district court.

The parent company of petitioner Janus Capital Management LLC is petitioner Janus Capital Group Inc. (formerly known as Stilwell Securities Laws Financial, Incorporated), a publicly traded corporation. There is no other publicly held corporation that owns 10 percent or more of the stock of either petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Janus Capital Group Inc. and Janus Capital Management LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–41a) is reported at 566 F.3d 111. The opinion of the district court (App., *infra*, 42a–53a) is reported at 487 F. Supp. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2009. A timely petition for rehearing was denied on June 2, 2009. App., *infra*, 56a–57a. The Chief Justice extended the time in which to file a petition for a writ of certiorari to and including October 30, 2009. *See* No. 09A95. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, are reproduced in the Appendix, *infra*, at 118a-119a.

STATEMENT

The district court dismissed the second amended complaint in this securities-fraud action because it did not adequately plead that the defendants had "made" the misstatements in issue. The Fourth Circuit reversed, holding that a service provider who allegedly "*helped* draft the misleading prospectuses" of

a different company can be held primarily liable in a private securities-fraud action "even if the statement on its face is *not* directly attributed to the defendant." App., *infra*, 17a, 24a (emphases added).

1. Defendant Janus Capital Group Inc. (JCG) is a publicly traded financial services company; defendant Janus Capital Management LLC (JCM) is a subsidiary of JCG that provides investment advisory and administrative services to the Janus family of mutual funds (Janus Funds). App., *infra*, 5a.

The Janus Funds—which were not defendants in the district court and did not participate in the appeal—are separate legal entities that are not owned by JCG or JCM. Each individual fund (for example, the Janus Mercury Fund) is a series of a business trust, and each series is a registered investment company under the Investment Company Act of 1940. *See In re Mut. Funds Inv. Litig.*, 519 F. Supp. 2d 580, 588–89 & n.11 (D. Md. 2007). The Funds are governed by a board of trustees that must meet statutory standards of independence from the investment adviser. *See Burks* v. *Lasker*, 441 U.S. 471, 482 (1979).

Federal law requires mutual funds (investment companies) to "register the securities that they issue and offer to the public," and "[i]nvestment companies making a continuous public offering of their securities must file their sales literature with the SEC." 3 T. Frankel & A.T. Schwing, *The Regulation of Money Managers: Mutual Funds and Advisers* (2d ed.) § 24.02[A], at 24-34. The obligation to prepare and file the prospectus and other offering materials is imposed on the mutual fund (as registrant and issuer), *not* the investment adviser. 15 U.S.C. § 80a-24(a).

2. Lead plaintiff First Derivative Traders traded shares of JCG common stock between 2000 and 2003. App., *infra*, 5a. Although lead plaintiff never invested in the Janus Funds, its "suit alleges that JCG's stock price was artificially inflated as a result of misleading statements in prospectuses issued by ... the 'Janus Funds.'" Pl. C.A. Br. 4. "The prospectuses for a number of the individual Janus funds stated that the funds had policies of discouraging market timing and that the funds engaged in measures to deter such behavior." App., *infra*, 5a. "The complaint alleges that the statements in the prospectuses regarding market timing were misleading because JCG and JCM have subsequently admitted that they 'had, for years, entered into secret arrangements to allow several hedge funds to engage in market timing transactions in various Janus Funds.'" *Id.* at 8a–9a (quoting *id.* at 72a ¶ 38).

The market timing issue came to light on September 3, 2003, when the New York Attorney General charged a hedge fund with improper trading in certain Janus (and other) mutual funds. App., *infra*, 9a. "[A]ccording to the complaint, the Attorney General's accusations caused 'a crisis of confidence among [JCG] common stock investors,' resulting in a twenty-three percent decrease in the value of JCG common stock." *Id.* at 11a (quoting *id.* at 62a–63a ¶ 10). Shortly thereafter, lead plaintiff sued JCG and JCM for securities fraud under Section 10(b) and Rule 10b-5.

3. The district court dismissed the second amended complaint. It emphasized that the complaint "contains no allegations that JCG actually made or prepared the prospectuses, let alone that any statements contained therein were directly at-

tributable to it." App., *infra*, 46a. Indeed, the court noted, lead plaintiff "concede[d] as much, arguing that '[t]he fact that the prospectus statements were not specifically attributed to defendants does not warrant dismissal.'" *Ibid.* (quoting Pl.'s Mem. Opp'n Defs.' Mot. Dismiss at 28) (second alteration in original).

The district court rejected lead plaintiff's argument that JCG could be held liable "'[w]hether or not [it] drafted the misleading prospectuses'" based on allegations that it had been "'actively involved in the dissemination of the misrepresentations with knowledge that the statements were false and misleading.'" App., *infra*, 46a (quoting Pl.'s Mem. Opp'n Defs.' Mot. Dismiss at 31) (first alteration in original). To the contrary, the court explained, "[o]ther courts have simply rejected the proposition that dissemination of a misleading document is tantamount to making a misstatement for securities fraud purposes." *Id.* at 47a. Accordingly, the district court concluded that "plaintiffs have not alleged facts sufficient to support their conclusory averment that JCG made a material misstatement or omission." *Id.* at 48a.

The district court found it unnecessary to "decide whether JCM made the alleged misstatements upon which plaintiffs rely" because "a mutual fund investment adviser that allegedly made representations to mutual fund shareholders cannot be liable under section 10(b) to its parent's shareholders who purchased no mutual fund shares." App., *infra*, 50a n.5, 53a.

4. The Fourth Circuit reversed. It recognized that the critical issue was whether lead plaintiff (and other investors in JCG common stock) had ade-

quately pleaded *reliance* on the alleged misstatements in the prospectuses for the Janus Funds. App., *infra*, 15a–17a. Although lead plaintiff had not purchased the securities offered by those prospectuses, it sought to invoke the "fraud-on-the-market" presumption of reliance, which requires (among other things) proof that the defendant "made public misrepresentations." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 n.27 (1988). As the Fourth Circuit explained, "JCM and JCG press two distinct aspects of this pleading requirement, arguing that plaintiffs do not adequately allege either (1) that defendants made the statements in the prospectuses or (2) that the statements in the prospectuses were sufficiently publicly attributable to defendants to hold them responsible." App., *infra*, 17a.

The Fourth Circuit first ruled that "although the individual fund prospectuses are unattributed on their face, the clear essence of plaintiffs' complaint is that JCG and JCM *helped* draft the misleading prospectuses." App., *infra*, 17a (emphasis added). The Fourth Circuit then quoted the allegations in the operative complaint:

> Specifically, the complaint alleges that defendants "wrote and represented [their] policy against market timers," [App., *infra*, 69a ¶ 31], and "publicly issued false and misleading statements," [*id.* at 109a ¶ 122]. The complaint also alleges that defendants "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans." [*Id.* at 60a ¶ 5]. According to the complaint, defendants made these represen-

> tations by "caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public," [*id.* at 60a ¶ 6], through filings with the SEC and dissemination on a joint Janus website.

App., *infra*, 17a–18a. The Fourth Circuit concluded that "[t]hese statements, taken together, allege that JCG and JCM, by *participating* in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a (first emphasis added). The sole "authority" cited by the Fourth Circuit was a district court opinion decided before *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

The Fourth Circuit next considered "whether these statements were sufficiently attributable to JCG and JCM." App., *infra*, 18a–19a. As the Fourth Circuit recognized, attribution is a prerequisite to the fraud-on-the-market presumption of reliance: "This requirement is necessary to ensure that the misleading information 'is reflected in the market price of the security.'" *Id.* at 18a (quoting *Stoneridge*, 128 S. Ct. at 769). The Fourth Circuit also acknowledged that "[t]he courts of appeal have diverged over the degree of attribution required to plead reliance." *Id.* at 19a. The Second and Eleventh Circuits require direct attribution. *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001). The Tenth Circuit has agreed, albeit in *dicta*. *See SEC* v. *Wolfson*, 539 F.3d 1249, 1258–60 (10th Cir. 2008). "The Ninth Circuit, in contrast, has concluded that public attribution is not required to plead reliance; substantial participation or intricate in-

volvement in preparing the misleading statement is sufficient to state a primary violation of § 10(b)." App., *infra*, 22a (citing *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628–29 & n.3 (9th Cir. 1994), and *Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000)).

The Fourth Circuit rejected the majority rule, which requires direct attribution, and adopted the Ninth Circuit's "substantial participation" test:

> [F]or the public attribution element of the reliance inquiry, we hold that a plaintiff seeking to rely on the fraud-on-the-market presumption must ultimately prove that interested investors (and therefore the market at large) would attribute the allegedly misleading statement to the defendant. At the complaint stage a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly infer that interested investors would have known that the defendant was responsible for the statement at the time it was made, *even if the statement on its face is not directly attributed to the defendant*.

App., *infra*, 23a–24a (emphasis added; citations omitted). The Fourth Circuit went on to hold that its newly announced standard was satisfied because "interested investors would have inferred that if JCM had not itself written the policies in the Janus fund prospectuses regarding market timing, it must at least have approved these statements." *Id.* at 31a. (Although the Fourth Circuit concluded that "plaintiffs' allegations of attribution ... are insufficient to reach JCG," *id.* at 32a, it held that JCG could be held

liable for JCM's conduct on a "control person" theory, *id.* at 38a–40a.)

The Fourth Circuit then devoted a single sentence to reconciling its holding with this Court's decision in *Stoneridge*: "While *Stoneridge* makes clear that the fraud-on-the-market presumption does not apply to transactions that are not publicly disclosed, the holding in *Stoneridge* has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." App., *infra*, 32a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit held that a service provider who allegedly "*helped* draft the misleading prospectuses" of a different company can be held primarily liable in a private securities-fraud action "even if the statement on its face is *not* directly attributed to the defendant." App., *infra*, 17a, 24a (emphases added). Both aspects of this holding raise significant questions of national importance that warrant attention by this Court.

First, by allowing this action to proceed against a defendant that did not itself make any misstatements, but only "helped" draft another company's statements, the Fourth Circuit's decision directly contravenes this Court's repeated pronouncements that Rule 10b-5 does not authorize a private right of action for aiding-and-abetting (*i.e.*, "helping") securities fraud. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768–69 (2008); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191–92 (1994). The Fourth Circuit's holding that a service provider may

be held primarily liable for "*participating* in the writing and dissemination of the prospectuses" of a different company (App., *infra*, 18a (emphasis added)) also brings the Fourth Circuit into conflict with several of its sister circuits. *See Regents* v. *CSFB*, 482 F.3d 372, 390 (5th Cir. 2007) ("The banks' participation in the transactions ... did not give rise to primary liability under § 10(b)"); *see also Fidel* v. *Farley*, 392 F.3d 220, 235 (6th Cir. 2004); *In re Charter Commc'ns, Inc. Sec. Litig.*, 443 F.3d 987, 992 (8th Cir. 2006), *aff'd sub nom. Stoneridge*, 128 S. Ct. 761. The Fourth Circuit failed to address this conflict.

Second, the Fourth Circuit's decision exacerbates an existing conflict among federal appellate courts on whether a statement must be directly attributed to a non-speaking defendant, such as a service provider to the issuer, for private liability to attach. *See* App., *infra*, 19a ("The courts of appeal have diverged over the degree of attribution required to plead reliance"). Most circuits require direct attribution as a prerequisite to invoking the fraud-on-the-market presumption of reliance. *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *see also SEC* v. *Wolfson*, 539 F.3d 1249, 1258–60 (10th Cir. 2008). The Fourth Circuit, however, rejected this majority rule in favor of the Ninth Circuit's "substantial participation" test. *See In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994). That test is irreconcilable with *Stoneridge*.

I. THE COURTS OF APPEALS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

The Fourth Circuit's holding that JCM can be held liable in a private securities class action for "helping" another company to draft statements that

were *not* contemporaneously attributed to JCM warrants this Court's review in two respects. *First*, by holding that it is not necessary for a service provider to have itself made the misstatement at issue, the Fourth Circuit's decision authorizes secondary liability in a manner that directly conflicts with prior decisions of this Court and other courts of appeals. *Second*, by holding that a service provider can be held liable for a statement that was not directly attributed to it, the Fourth Circuit erroneously adopted the minority side of a 3–2 circuit split.

A. The Fourth Circuit Created A Circuit Split By Holding That "Participation" Suffices For Primary Liability

This Court held in *Stoneridge* that, because private Rule 10b-5 liability does not reach aiding and abetting, a service provider cannot be held liable for "providing assistance" to a company that makes a false statement. 128 S. Ct. at 771. The courts of appeals have similarly rejected liability for service providers who did not themselves make any misstatements. *Regents*, 482 F.3d at 390; *Fidel*, 392 F.3d at 235; *Charter Commc'ns*, 443 F.3d at 992. The Fourth Circuit ran afoul of *Stoneridge* and created a split with other courts of appeals by allowing claims against JCM to proceed on the theory that JCM "helped" the Janus Funds make misstatements. App., *infra*, 17a.

1. Lead plaintiff's securities-fraud suit is premised entirely on certain statements contained in the prospectuses for the Janus Funds. *See* App., *infra*, 8a ("The complaint alleges that the statements in the prospectuses regarding market timing were misleading ..."). Those statements, however, were

made *by the Janus Funds*—separate legal entities, with separate boards of trustees and separate legal counsel. The prospectuses and statements of additional information (SAI) make clear that the Janus Funds—*not* JCM (nor JCG)—bear the "costs of *preparing*, printing and mailing the *Funds*' Prospectuses and SAI to current shareholders." C.A. App. 366 (emphases added); *see also id.* at 393. SEC Form N-1A explains that the offering materials are filed "on behalf of" the Janus Funds, and that the purpose of the filing is to "update the financial information of the Trust [*i.e.*, the Funds]." *Id.* at 342. (The Fourth Circuit's statement that "the individual fund prospectuses are unattributed on their face," App., *infra*, 17a, is therefore as inexplicable as it is incorrect.)

JCM, which is merely a service provider to the Funds, *did not make the statements in the Funds' prospectuses*. JCM does not own the Funds, nor does it issue or distribute the securities offered by the Funds' prospectuses. As the prospectuses themselves make clear, JCM "serves as investment adviser to each Fund." C.A. App. 394. The SAI spells out in more detail the services that JCM provides, including "advice and recommendation regarding the Funds' investments" and "management and administrative services necessary for the operation of the Funds." *Id.* at 366. As just noted, however, these services do *not* include "preparing, printing and mailing the Funds' Prospectuses and SAI." *Ibid.*

2. Lead plaintiff did not allege, and the Fourth Circuit did not find, that JCM *actually made* any of the statements in issue. Rather, the Fourth Circuit concluded that "JCM *helped draft* the misleading prospectuses." App., *infra*, 17a (emphasis added).

Even assuming that the operative complaint adequately pleads *any* JCM involvement in drafting the prospectuses (*but see Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949–50 (2009)), the Fourth Circuit's holding that JCM can be held liable for "helping" another company make a misstatement is flatly inconsistent with this Court's precedent.

"The § 10(b) implied private right of action does not extend to aiders and abettors." *Stoneridge*, 128 S. Ct. at 769; *see also Central Bank*, 511 U.S. at 191–92. "Aid" means to help or assist. *Webster's New International Dictionary* 53 (2d ed. 1955). Imposing liability on JCM for "helping" the Janus Funds to draft their prospectuses is nothing other than aiding-and-abetting liability. Congress has authorized the SEC to prosecute aiders and abettors, but it made the deliberate decision to withhold similar authority from private securities plaintiffs; in *Stoneridge*, the Court held that this congressional determination must be respected. 128 S. Ct. at 768. The Court specifically rejected the notion that a service provider can be held liable for "providing assistance" to a company that makes a false statement. *Id.* at 771. That is all JCM is alleged to have done here.

The Fourth Circuit's decision contravenes *Stoneridge* by allowing claims against service providers who did not make misstatements but merely "helped" others who did. App., *infra*, 17a. This Court has expressly held that service providers—including investment advisers—may not be held liable for securities fraud unless they *themselves* satisfy each of the elements for primary liability. *Stoneridge*, 128 S. Ct. at 769 ("The conduct of a secondary actor must satisfy each of the elements or preconditions for liability").

The Fourth Circuit said, however, that by "*participating* in the writing and dissemination of the prospectuses," JCM "*made* the misleading statements contained in the documents." App., *infra*, 18a (first emphasis added). The Fourth Circuit erred as a matter of law in equating "participating" with "making." Rule 10b-5(b), of course, speaks only to "mak[ing]." 17 C.F.R. § 240.10b-5(b). "Participating"—like "facilitating," "helping," "assisting," and similar verbs—is a signifier of *secondary* action. Primary liability under Rule 10b-5 does not extend to such conduct, but reaches only "a material misrepresentation or omission *by the defendant*." *Stoneridge*, 128 S. Ct. at 768 (emphasis added).

3. The sole "authority" cited by the Fourth Circuit was a pre-*Stoneridge* district court case, App., *infra*, 18a (citing *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 334 (S.D.N.Y. 2004)), which was wrong for the same reasons the Fourth Circuit decision is wrong. And, of course, district court decisions are not precedents. *See Harzewski* v. *Guidant Corp.*, 489 F.3d 799, 806 (7th Cir. 2007). The Fourth Circuit failed to acknowledge the substantial body of *appellate* authority on this issue, all of which points in the other direction.

In *Regents*, for instance, the Fifth Circuit rejected liability for banks that had allegedly entered into transactions that allowed Enron to misstate its financial position. 482 F.3d at 390. The court reasoned that these service-provider defendants "at most aided and abetted Enron's deceit by making its misrepresentations more plausible," which was insufficient for primary liability because the banks did not themselves make any misrepresentations. *Ibid.* ("The banks' participation in the transactions, re-

gardless of the purpose or effect of those transactions, did not give rise to primary liability under § 10(b)").

Similarly, in *Fidel*, the Sixth Circuit affirmed the dismissal of a suit claiming that Ernst & Young had committed securities fraud by allowing one of its auditing clients to include unaudited financial results in the client's registration statement. 392 F.3d at 235. The Sixth Circuit rejected liability because "Ernst & Young itself did not make a material misstatement or omission with regard to the unaudited financials." *Ibid.*

Indeed, in the decision that led to *Stoneridge*, the Eighth Circuit rejected an attempt to hold two equipment vendors liable for entering into contracts with a cable company that, the plaintiffs alleged, permitted the cable company to inflate its financial results. *Charter Commc'ns*, 443 F.3d at 992. The Eighth Circuit rejected liability because the defendants "did not issue any misstatement." *Ibid.*

The holding below that JCM could be held liable under Rule 10b-5 for "helping" the Janus Funds make misstatements, even though JCM did not itself make those misstatements, brings the Fourth Circuit into conflict with its sister circuits, as well as with *Stoneridge* itself. This Court's review is warranted to bring the Fourth Circuit's jurisprudence back into line with the rest of the federal judiciary.

B. The Fourth Circuit Exacerbated An Existing Circuit Split By Holding That "Direct Attribution" Is Not Required

Even if JCM could be said to have "made" the statements in the Janus Funds' prospectuses, those

statements concededly were not directly attributed to JCM. Before the Fourth Circuit's decision in this case, the federal courts of appeals had split on the question whether a service provider's involvement in a misstatement must be directly attributed as a prerequisite to a finding of reliance and, hence, liability. *See* App., *infra*, 19a ("The courts of appeal have diverged over the degree of attribution required to plead reliance"). The Fourth Circuit opted to join the minority side of this circuit split, resulting in a 3–2 disagreement among the courts of appeals that warrants this Court's attention.

1. In private securities-fraud suits, unlike SEC enforcement actions, the plaintiff must plead with particularity that it "reli[ed] upon the misrepresentation or omission." *Stoneridge*, 128 S. Ct. at 768 (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341–42 (2005)); *see also Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310 (2007). Such suits can proceed as class actions only if reliance is *presumed*, because in the absence of such a presumption common questions do not predominate. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988); *see also, e.g.*, *Gunnells* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 435 (4th Cir. 2003). This Court has held that reliance may be presumed under a "fraud-on-the-market" theory where the defendant made a public misstatement regarding a security that trades in an efficient market. *See Basic*, 485 U.S. at 248–50.

In *Wright* v. *Ernst & Young*, the Second Circuit held that "a secondary actor cannot incur primary liability under the [Exchange] Act for a statement not attributed to that actor at the time of its dissemination." 152 F.3d at 175; *see ibid.* ("the misrepresentation must be attributed to that specific actor

at the time of public dissemination"). The Second Circuit reasoned that failing to require attribution would "circumvent the reliance requirements of the [Exchange] Act, as '[r]eliance only on misrepresentations made by others cannot itself form the basis of liability.'" *Ibid.* (quoting *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996)). *Wright* therefore concluded that an auditor could not be held liable for public statements by its client because, as in this case, the company "did not attribute" those statements to the auditor. *Ibid.*; *see also, e.g.*, *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 155 (2d Cir. 2007) ("a party can incur liability only if a misstatement is attributed to it at the time of dissemination").

The Second Circuit's subsequent decision in *Lattanzio* dispels the Fourth Circuit's speculation that *Wright* does not require the statement to be "attributed on its face to the defendant" if "the investing public would infer [it] was drafted or approved by the defendant." App., *infra*, 21a. "Unless the public's understanding [that the statement was approved by the service provider] is *based on the [service provider]'s articulated statement*, the source for that understanding—whether it be a regulation, an accounting practice, or something else—does not matter." *Lattanzio*, 476 F.3d at 155 (emphasis added).

The Eleventh Circuit has similarly held that a defendant may be primarily liable under Rule 10b-5 only if the alleged misrepresentation was "publicly attributable to the defendant." *Ziemba*, 256 F.3d at 1205. In *Ziemba*, the plaintiffs sued a law firm for its "significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases" issued by a public company. *Ibid.* (internal quotation

marks omitted). The Eleventh Circuit upheld the dismissal of the suit because "no misrepresentations attributable to [the law firm] were ever made to Plaintiffs." *Ibid.*

Although the Tenth Circuit initially staked out what it characterized as a middle ground, *see Anixter*, 77 F.3d at 1225–26, it has more recently (*i.e.*, since *Stoneridge* was decided) expressed approval of the *Wright-Ziemba* majority rule. *See Wolfson*, 539 F.3d at 1258–60 ("the attribution requirement ... stems directly from the need for private litigants to prove reliance on an alleged fraud to succeed on a private cause of action" (emphases omitted)).*

In contrast to this majority rule, the Ninth Circuit has concluded that private Rule 10b-5 liability may be imposed on a defendant that merely "played a significant role in drafting and editing" the misleading statement. *Software Toolworks*, 50 F.3d at 628 n.3. According to the Ninth Circuit, "substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might

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* In *SEC* v. *Tambone*, a panel of the First Circuit likewise expressed its agreement with the majority rule. 550 F.3d 106, 137–40 (1st Cir. 2008). Like *Wolfson*, *Tambone* was an SEC enforcement action, in which reliance is not an element, but the panel nonetheless recognized (albeit in *dicta*) that "public attribution ... is necessary in a *private* action." *Id.* at 139 (emphasis added). The First Circuit has subsequently agreed to rehear *Tambone en banc*, and the panel opinion has been withdrawn. *SEC* v. *Tambone*, 573 F.3d 54, 55 (1st Cir. 2009). Because reliance is not at issue in *Tambone*, however, the case does not present the *en banc* First Circuit with a choice between the competing approaches "over the degree of attribution required to plead reliance." App., *infra*, 19a.

not lead to the actor's actual making of the statements." *Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000).

2. Faced with this express and acknowledged conflict among the circuits, the Fourth Circuit rejected the majority rule and adopted the Ninth Circuit's "substantial participation" standard. App., *infra*, 23a–24a. The choice between these two standards was outcome-determinative in this case. It is undisputed that the statements in the Janus Funds' prospectuses were *not* directly attributed to JCM; accordingly, the dismissal would have to be affirmed under the majority rule. Only by adopting the minority rule, which does not require direct attribution, was the Fourth Circuit able to reverse the dismissal.

Not only did this decision exacerbate an existing circuit split, the Fourth Circuit chose the wrong side of the debate by adopting a standard that is inconsistent with this Court's decision in *Stoneridge*. As this Court explained, if a particular defendant's deceptive acts are "not disclosed to the investing public," they "are too remote to satisfy the requirement of reliance." 128 S. Ct. at 770. This requirement of actual public disclosure leaves no room for a "substantial participation" standard.

The Fourth Circuit tried to dispense with *Stoneridge* in a single curt sentence: "[T]he holding in *Stoneridge* has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." App., *infra*, 32a. But the statements in *Stoneridge*—the issuer's financial results—*were* publicly disclosed; the question was whether the service provider

whose involvement was not disclosed could be held liable for those statements. 128 S. Ct. at 767. This Court's "no" answer applies equally here, where whatever involvement JCM may have had in the Janus Funds' public statements was never publicly disclosed.

The issue in this case arises whenever a service provider—an accountant, a banker, a lawyer, or (as here) an investment adviser—is sued in a private Rule 10b-5 action on the basis of public statements made by a public company client of the service provider. These lawsuits often threaten massive liability. *Stoneridge*, 128 S. Ct. at 772. If the courts of appeals diverge on when secondary actors may be sued, securities plaintiffs will migrate to those courts that enable them to ensnare the greatest number of deep-pocket defendants. To prevent the Fourth and Ninth Circuits from becoming the forums of choice for overbroad securities lawsuits against service providers, this Court should grant review and resolve the 3–2 split deepened by the Fourth Circuit's decision below.

II. Both Questions Presented Are Important To Investors And The Securities Markets.

If allowed to stand, the Fourth Circuit's resolution of both questions presented would upset the securities and financial markets by exposing secondary actors to unpredictable and potentially massive liability for the misconduct of others. The Fourth Circuit's decision offers no clear rule regarding how substantially a service provider must "participat[e] in the writing and dissemination" of a false statement before it will be deemed to have "made" that statement. App., *infra*, 18a. Nor, having abandoned the

direct attribution requirement, does the Fourth Circuit provide any meaningful guidance about when "interested investors ... would attribute" an unattributed but "allegedly misleading statement to the defendant." *Id.* at 23a.

The uncertainty created by the Fourth Circuit's decision is harmful to individual investors and the securities markets generally. *See, e.g.*, R.K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) ("Overbreadth and uncertainty deter beneficial conduct and breed costly litigation"). As this Court has warned, "uncertainty and excessive litigation can have ripple effects." *Central Bank*, 511 U.S. at 189. The Fourth Circuit's decision promises many such ripple effects, at a time when the markets are already beset with volatility.

First, the holding will lead to more claims against secondary participants in the securities markets based on allegations that the performance of their roles equates to the making of actionable misstatements. Opening the door to these claims would frustrate Congress's decision to bar private aiding-and-abetting claims. Congress enacted the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, "to protect investors and maintain confidence in our capital markets" in response to "significant evidence" of abusive litigation practices. H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). The abuses that prompted Congress to enact these reforms included "the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability." *Ibid.* Following

this Court's decision in *Central Bank*, lawmakers deliberated over the merits of allowing private aiding-and-abetting claims:

> The Committee considered testimony endorsing the result in *Central Bank* and testimony seeking to overturn this decision. The Committee believes that amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation.

S. Rep. No. 104-98, at 19 (1995). Thus, Congress decided to forbid private plaintiffs from asserting aiding-and-abetting claims, while authorizing the SEC to pursue them. *See ibid.*; 15 U.S.C. § 78t(e). The Fourth Circuit's holding invites private plaintiffs to resurrect aiding-and-abetting liability through the simple artifice of pleading "substantial participation" liability. This would frustrate Congress's judgment.

Second, uncertainty over Section 10(b) and Rule 10b-5 liability would lead service-provider defendants "to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Central Bank*, 511 U.S. at 189. Congress was responding, in part, to this very concern when it reformed the securities laws in 1995 and again in 1998. *See* H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.) (explaining that "the legislation is designed" to reduce "'strike' suits" filed "to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit"); H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (explaining that the reforms were prompted, in part, by "the abuse of the discovery process to impose costs so

burdensome that it is often economical for the victimized party to settle").

Third, "the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors." *Central Bank*, 511 U.S. at 189. Thus, "extending the reach of civil liability under Section 10(b) might, in fact, harm investors, the intended beneficiaries of the statute." I.J. Sugarman, *Lawyers & Accountants Liability After* Central Bank, 1998 A.B.A. Sec. Litig. & Arbitration G-79, at *G-79; L. Zingales, *et al.*, Committee on Capital Markets Regulation, *Interim Report of Committee on Capital Markets Regulation*, at x (Nov. 30, 2006) (reporting that an "important factor" contributing to the "loss of U.S. public market competitiveness compared to global public markets" is the "growth of U.S. regulatory compliance costs and liability risks compared to other developed and respected market centers").

Fourth, the risk of increased liability would drive business decisions that could ultimately harm investors. Industries that are frequently targeted for litigation or that are subject to complex rules governing service providers might find that high-quality services are unavailable or, at a minimum, more costly. In addition, "newer and smaller companies may find it difficult to obtain advice from professionals." *Central Bank*, 511 U.S. at 189. Service providers "may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others." *Ibid.* A reduction in the availability of these services would undermine both the reliability of the securities markets and investors' confidence, con-

trary to "[t]he overriding purpose of our Nation's securities laws." H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.).

* * *

This Court held in *Stoneridge* that private liability under Section 10(b) and Rule 10b-5 is appropriate for "secondary actors" only when they "commit primary violations." 128 S. Ct. 773–74. The Fourth Circuit's decision contravenes that holding, and significantly deepens the split among the circuits on both questions presented, by authorizing private lawsuits in which service providers (such as auditors, lawyers, bankers, and investment advisers) may be held primarily liable for participating in others' misstatements, regardless of whether those misstatements were attributed to the defendant. The uncertainty and excessive litigation that this decision would generate for secondary actors "disserve the goals of fair dealing and efficiency in the securities markets" (*Central Bank*, 511 U.S. at 188) and warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 30, 2009.

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re: Mutual Funds Investment Litigation

First Derivative Traders, on behalf of itself and all others similarly situated,

Plaintiff-Appellant,

and

Craig Wiggins, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Janus Capital Group, Incorporated, f/k/a Stilwell Securities Laws Financial,

No. 07-1607

Incorporated, Janus Capital Management,

Defendants-Appellees,

and

Mark B. Whiston; Loren M. Starr; Gregory A. Frost,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (1:04-cv-00818-JFM; 1 :04-md-15863-JFM)

Argued: October 31, 2008

Decided: May 7, 2009

Before MICHAEL, SHEDD, and DUNCAN, Circuit Judges.

Reversed and remanded by published opinion. Judge Michael wrote the opinion, in which Judge Duncan concurred. Judge Shedd wrote a separate concurring opinion.

COUNSEL

ARGUED: Ira M. Press, KIRBY MCINERNEY, L.L.P., New York, New York, for Appellant. Mark Andrew Perry, GIBSON, DUNN & CRUTCHER, L.L.P., Washington, D.C., for Appellees. **ON BRIEF:** Amanda M. Rose, GIBSON, DUNN & CRUTCHER, L.L.P., Washington, D.C., for Appellees.

OPINION

MICHAEL, Circuit Judge:

Plaintiff First Derivative Traders (First Derivative) appeals the Rule 12(b)(6) dismissal of its putative class action complaint, which alleges violations of § 10(b) and § 20(a) of the Securities Exchange Act of 1934 (Act) and Securities and Exchange Commission (SEC) Rule 10b-5. First Derivative, individually and on behalf of certain shareholders of Janus Capital Group Inc. (JCG), filed the operative complaint against JCG and its wholly-owned subsidiary Janus Capital Management LLC (JCM). JCM is the investment advisor to the Janus mutual funds. The complaint alleges that JCG and JCM were responsible for certain misleading statements appearing in prospectuses for a number of the individual Janus funds during the class period. These statements represented that the funds' managers did not permit, and took active measures to prevent, "market timing" of the funds. First Derivative contends that class members (plaintiffs) bought JCG shares at inflated prices and thereafter lost money when market timing practices authorized by JCG and JCM became known to the public.

The district court concluded that plaintiffs had failed to sufficiently plead certain elements of a § 10(b) securities fraud action against either JCG or JCM. Additionally, the district court determined that plaintiffs' claim of control person liability against JCG under § 20(a) failed because plaintiffs had not pled a viable § 10(b) securities fraud claim against JCM. After reviewing the allegations on our own, we reach a different conclusion. We hold that plaintiffs' § 10(b) primary liability claim against JCM and

plaintiffs' § 20(a) control person liability claim against JCG are sufficiently pled to overcome defendants' motion to dismiss. Accordingly, we reverse the district court's order granting defendants' motion to dismiss and remand the case for further proceedings.

I.

Plaintiffs seek to hold JCG and JCM liable for fraud under § 10(b) of the Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. In addition, plaintiffs allege that JCG is liable under § 20(a) of the Act, 15 U.S.C. § 78t(a), as a control person of JCM.

The original complaint was filed against JCG in U.S. District Court in Colorado in November 2003 by Craig Wiggins, a purchaser of JCG common stock. On March 26, 2004, the Judicial Panel on Multidistrict Litigation transferred the Wiggins action from the District of Colorado to the District of Maryland for coordination with other actions involving allegations of market timing in the mutual funds industry. After the district court appointed a lead plaintiff (First Derivative) and lead counsel, First Derivative filed an amended complaint in September 2004, which, among other things, added JCM as a defendant. Defendants filed a motion to dismiss this amended complaint in February 2005, and the district court granted dismissal on the narrow ground that plaintiffs' class definition failed to satisfy the loss causation standard articulated in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

First Derivative then filed a second amended complaint (the complaint). The basic facts as alleged by the plaintiffs in the complaint are as follows.

Defendant JCG is an asset management firm that, directly or through subsidiaries, sponsors and markets mutual funds and provides investment advisory and administrative services to the funds. Defendant JCM, a wholly-owned subsidiary of JCG, is JCG's primary operating company and there is overlap in the executive officers of the two companies. The greater part of JCG's revenue is generated by JCM. JCM serves as the investment advisor and administrator to the Janus funds. As investment advisor to the various Janus funds, JCM "is responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds." J.A. 206-07. "[A]s a practical matter" JCM runs the Janus family of funds. J.A. 212. First Derivative sues on behalf of persons who bought shares of common stock in JCG between July 21, 2000, and September 2, 2003, and still held shares on September 3, 2003, when their price dropped, allegedly as a result of the public disclosure of defendants' misconduct with respect to market timing.

Shares in the Janus funds were offered for sale by prospectuses that JCG and JCM "caused . . . to be issued" and "made . . . available to the investing public." J.A. 203. The prospectuses were made available to potential investors on a joint Janus funds-JCG-JCM website, www.janus.com. The prospectuses for a number of the individual Janus funds stated that the funds had policies of discouraging market timing and that the funds engaged in measures to deter such behavior.

Market timing, as it occurred here, refers to the practice of rapidly trading in and out of a mutual fund to take advantage of inefficiencies in the way

the fund values its shares. Some funds, including the Janus funds, use stale prices to calculate the value of the securities held in the fund's portfolio (net asset values (NAVs)), which may not reflect the fair value of the securities as of the time the NAV is calculated. The use of stale prices to calculate the NAV makes a fund vulnerable to time zone arbitrage and other similar strategies; repeated use of such strategies is referred to as "timing" the fund. Time zone arbitrage can occur when a fund is invested in foreign securities. As we explained in *In re Mutual Funds Investment Litig.*:

> [T]ime zone differences allow market timers to purchase shares of [mutual] funds [that invest in foreign securities] based on events occurring after foreign market closing prices are established, but before the fund's NAV calculation. Prior to the daily NAV calculation, which in the United States generally occurs at or near the closing time of the major U.S. securities markets, the fund price would not take into account any changes that have affected the value of the foreign security. Therefore, if the foreign security had increased in value, the NAV for the mutual fund would be artificially low. After purchasing the shares at the low price, the market timer would redeem the fund's shares the next day when the fund's share price would reflect the increased prices in foreign markets, for a quick profit at the expense of the long-term fund shareholders.

529 F.3d 207, 211 (4th Cir. 2008) (internal citations and quotations omitted). Market timing has the potential to harm other fund investors by diluting

the value of shares, increasing transaction costs, reducing investment opportunities for the fund, and producing negative tax consequences.

Plaintiffs charge that statements about market timing appearing in the various Janus fund prospectuses were misleading because they falsely represented that the Janus funds had policies of preventing market timing when, in fact, fund managers explicitly permitted significant market timing and late trading to occur.

Specifically, plaintiffs allege in their complaint that Janus fund prospectuses filed with the SEC and available at the Janus website "included language that said Janus' funds were 'not intended for market timing or excessive trading' and said 'Janus had measures in place to stop th[is] trading.'" J.A. 212-13. The complaint also cites numerous passages from prospectuses for individual Janus funds condemning the practice of market timing and outlining steps that would be taken to exclude market timers or excessive traders from the funds. For example, the complaint quotes the "Excessive Trading Policy" as set forth in the February 28, 2003, prospectus for the Janus Mercury Fund:

> Frequent trades in your account or accounts controlled by you can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders. The fund is not intended for market timing or excessive trading. To deter these activities, the Fund or its agent may temporarily or permanently suspend or terminate exchange privileges of any investor who makes more than four exchanges out of the Fund in a calendar year and bar future purchases into

> the Fund by such investor. In addition, the Fund or its agent also may reject any purchase orders (including exchange purchases) by any investor or group of investors indefinitely for any reason, including, in particular, purchase orders that they believe are attributable to market timers or are otherwise excessive or potentially disruptive to the Fund.
>
> Orders placed by an investor in violation of the exchange limits or the excessive trading policies or by investors that the Fund believes are market timers may be revoked or cancelled by the Fund . . . .

J.A. 213. The complaint repeats this language as it appeared in an earlier Janus Mercury Fund prospectus filed on Form N-1A with the SEC on February 25, 2002, and notes that "[p]rospectuses for the Janus Enterprise Fund, Janus Mercury Fund, Janus High-Yield Fund, Janus Worldwide Fund, and Janus Overseas Fund contain the exact same language in their prospectuses filed on Form N-1A with the Securities and Exchange Commission on February 25, 2002." J.A. 217. The complaint also identifies similar language in the prospectus for the Janus Advisor Worldwide Fund and the Janus International Growth Fund filed on Form N-1A with the SEC on September 30, 2001, and identifies additional allegedly misleading language in several fund prospectuses.

The complaint alleges that the statements in the prospectuses regarding market timing were misleading because JCG and JCM have subsequently admitted that they "had, for years, entered into secret arrangements to allow several hedge funds to

engage in market timing transactions in various Janus Funds." J.A. 213. Drawing on a complaint filed on September 3, 2003, by the New York Attorney General in a separate action, plaintiffs allege that in 2002 JCG "granted permission for" the Canary Partners hedge fund to market time the Janus Mercury and Janus High Yield Funds. J.A. 230. Thereafter, in 2003 Canary Partners "sought [market] timing capacity in Janus' offshore funds." J.A. 231. In response to Canary Partners' request for additional timing capacity, "a concerned [JCG] employee" sent the following email message to Richard Garland, the CEO of Janus International Growth Fund:

> I'm getting more concerned w/ all of these market timers and how they are affecting our PM's [i.e., Portfolio Managers] trading activity. [Portfolio Managers] have voiced their sensitivity on a number of occasions re: this type of activity in JWF[1]. I spoke to [a Janus employee] and confirmed that this is a big problem domestically and I want to avoid this at all cost before it gets too problematic offshore. Now that we have our exchange limitation in our prospectus, I would feel more comfortable not accepting this type of business because its too difficult to monitor/enforce & it is very disruptive to the PM's & operation of the funds. Obviously, your call from the sales side.

J.A. 231 (quoting New York Attorney General's complaint) (alterations in First Derivative's

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1 Janus Worldwide Fund.

complaint). Eventually, as described in plaintiffs' complaint:

> • Managing the extensive timing activity in its funds became difficult for Janus. In early June, 2003, it began to consider adopting a consistent policy on market timing. Discussion concerning development of such a policy was opened up to certain Janus employees. Comments included:
>
> • "Our stated policy is that we do not tolerate timers. As such, we won't actively seek timers, but when pressed and when we believe allowing a limited/controlled amount of timing activity will be in JCG's best interests (increased profitability to the firm) we will make exceptions under these paramaters [sic]."
>
> • "My own personal recommendation is not to allow timing, period, and follow the prospectus. . . . [T]imers often hide multiple accounts and move on the same day which could hurt other investors and enrage the Pms. . . . I don't think the static assets that we might be able to hold onto are worth the potential headaches, nor does this fall into our 'narrow and deep' focus. I suggest we maintain the timing agreements we have, but allow no more."

J.A. 232 (quoting New York Attorney General's complaint) (internal citations removed; alterations in First Derivative's complaint). JCG later admitted to the facts alleged in the Attorney General's complaint and to market timing arrangements with at least ten investors.

Plaintiffs assert that the misleading statements in the Janus funds' prospectuses stating the funds' policy of deterring market timing fraudulently induced investors to buy shares in the Janus funds. As a result of these investments, the assets in the Janus funds, and JCM's management fees, increased. JCM's management of the assets in the Janus funds generated more than ninety percent of JCG's revenue. Consequently, in September 2003 when the New York Attorney General's complaint made public the actions taken by JCG and JCM's executives to permit substantial market timing contrary to the Janus funds' expressed policies, massive withdrawals or redemptions from the funds were triggered. The assets under management by JCM decreased by $14 billion between September 2003 and February 2004. "Relatedly and predictably," according to the complaint, the Attorney General's accusations caused "a crisis of confidence among [JCG] common stock investors," resulting in a twenty-three percent decrease in the value of JCG common stock. J.A. 204-05.

The district court reviewed the complaint and granted defendants' motion to dismiss pursuant to Rule 12(b)(6). The court held that plaintiffs failed to state a claim against JCG under § 10(b) of the Act because the complaint "contains no allegations that JCG actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it," and there can be no aiding and abetting liability in private securities fraud actions. J.A. 612-13 (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)). The district court further held that JCG's alleged dissemination of the prospectuses did not rise to the level of making a misstatement for

securities fraud purposes. The district court determined that plaintiffs failed to state a claim against JCM because § 10(b) requires a plaintiff to demonstrate that the alleged fraud occurred in connection with the purchase or sale of a security, and since the district court had previously held that a mutual fund investment adviser owes no duty to its parent's shareholders, there was no nexus between plaintiffs as JCG shareholders and JCM. The court ruled, fmally, that plaintiffs' claim of control person liability against JCG pursuant to § 20(a) of the Act must be dismissed because plaintiffs had failed to plead a viable § 10(b) claim against JCM. Plaintiffs appeal.

II.

The central question before us is whether plaintiffs have successfully met the pleading requirements for a § 10(b) or Rule 10b-5 securities fraud claim. We review *de novo* the district court's dismissal for failure to state a claim. *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 170 (4th Cir. 2007). And "[w]e must accept as true all well-pleaded allegations and view the complaint in the light most favorable to" the plaintiffs. *Hatfill v. New York Times Co.*, 416 F.3d 320, 329 (4th Cir. 2005).

Pursuant to § 10(b) of the Act, it is

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the

> Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j (2006).

> Rule 10b-5 makes it unlawful
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2008). Rule 10b-5, of course, "encompasses only conduct already prohibited by § 10(b)." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, ___ U.S. ___, 128 S. Ct. 761, 768 (2008).

The Supreme Court has clarified that a plaintiff suing in a typical private action under § 10(b) must prove six elements: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation" (that is, the economic loss must be proximately caused by the misrepresentation or omission). *Id.* Defendants

challenge the sufficiency of plaintiffs' complaint for elements (4) and (6): reliance and loss causation.

Prior to the enactment of the Private Securities Litigation Reform Act (PSLRA) of 1995, Pub.L. No. 104-67, 109 Stat. 737, § 10(b) fraud claims in this circuit "were governed by Federal Rule of Civil Procedure 9(b), not Rule 8." *Pub. Employees' Ret. Ass'n of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 311 (4th Cir. 2009). The PSLRA, however, has modified the pleading requirements applicable to private securities fraud actions "(1) by requiring a plaintiff to plead facts to state a claim and (2) by authorizing the court to assume that the plaintiff has indeed stated all of the facts upon which he bases his allegation of a misrepresentation or omission." *Teachers'*, 477 F.3d at 172. Because "Congress only addressed misrepresentations and scienter in § 78u-4(b) [of the PSLRA]," the other elements of a securities fraud claim are analyzed under the pleading standards of the Federal Rules of Civil Procedure. *Id.* Consequently, the PSLRA's heightened pleading requirements do not govern our analysis of the elements of reliance or loss causation.

Rather, we must look to traditional pleading requirements for fraud claims. At the time of the filing of the complaint in this action, Rule 9(b) provided that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."[2] Rule 9(b)

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[2] After the complaint in this case was filed, the text of Rule 9(b) was changed to make it "more easily understood and to make style and terminology consistent throughout the rules." Fed. R. Civ. P. 9 advisory committee's notes (2007 Amendment). The advisory committee note makes

[Footnote continued on next page]

requires that plaintiffs plead "with particularity . . . 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1297, at 590 (2d ed. 1990)). For the element of loss causation, we have specifically explained that

> a plaintiff purporting to allege a securities fraud claim must not only prove loss causation—that the material misrepresentations or omissions alleged actually caused the loss for which the plaintiff seeks damages—but he must also plead it with sufficient specificity to enable the court to evaluate whether the necessary causal link exists.

Teachers', 477 F.3d at 186. Consequently, for loss causation, we review plaintiffs' complaint for sufficient specificity.

A.

We turn first to the adequacy of plaintiffs' allegations of the element of reliance.

To state a private § 10(b) securities fraud claim, a plaintiff must allege that it relied on the defendant's false or misleading statement in

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[Footnote continued from previous page]

clear that "[t]hese changes are intended to be stylistic only." *Id.*

purchasing or selling the defendant's securities. Reliance may be proven directly or, under certain circumstances, a plaintiff may seek the benefit of a rebuttable presumption of reliance. The Supreme Court has determined that a rebuttable presumption of reliance may apply in two distinct situations. First, when "there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance." *Stoneridge*, 128 S. Ct. at 769 (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 154 (1972)). Second, "under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public. The public information is reflected in the market price of the security. Then it can be assumed that an investor who buys or sells stock at the market price relies upon the statement." *Stoneridge*, 128 S. Ct. at 769 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988)).

Plaintiffs in their complaint allege that the fraud-on-the-market presumption is applicable to their claims. As our court has outlined:

> To gain the benefit of the presumption [of fraud-on-the-market], a plaintiff must prove (1) that the defendant made the public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; and (4) that the plaintiff purchased the shares after the misrepresentations but before the truth was revealed.

Gariety v. Grant Thornton, LLP, 368 F.3d 356, 364 (4th Cir. 2004) (internal quotations removed). JCG and JCM dispute only the first of these elements:

that is, whether plaintiffs sufficiently alleged that defendants made the public misrepresentations. JCG and JCM press two distinct aspects of this pleading requirement, arguing that plaintiffs do not adequately allege either (1) that defendants made the statements in the prospectuses or (2) that the statements contained in the prospectuses were sufficiently publicly attributable to defendants to hold them responsible.

1.

We begin by considering whether plaintiffs have pled that JCG and JCM made the allegedly misleading statements about market timing that appeared in the prospectuses for the various Janus funds.

Defendants are correct that a § 10(b) securities fraud claim requires "a material misrepresentation or omission *by* the defendant." *Stoneridge*, 128 S. Ct. at 768 (emphasis added). Under Rule 9(b) a plaintiff must plead with particularity "the identity of the person making the misrepresentation." *Harrison*, 176 F.3d at 784. In this case, although the individual fund prospectuses are unattributed on their face, the clear essence of plaintiffs' complaint is that JCG and JCM helped draft the misleading prospectuses. Specifically, the complaint alleges that defendants "wrote and represented [their] policy against market timers," J.A. 211, and "publicly issued false and misleading statements," J.A. 240. The complaint also alleges that defendants "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans." J.A. 202. According to the complaint, defendants made these representations by "caus[ing]

mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public," J.A. 203, through filings with the SEC and dissemination on a joint Janus website. These statements, taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents. *Cf. In re Global Crossing, Ltd. Sec. Litig.*, 322 F.Supp.2d 319, 334 (S.D.N.Y. 2004) ("Allegations that [auditor Arthur] Andersen 'prepared, directed or controlled,' 'helped create' or 'materially assisted in' preparing false statements issued by Global Crossing place its involvement well beyond the realm of 'aiding and abetting' liability precluded by *Central Bank*."). And the allegations are sufficiently clear as to the identity of the entities making the misleading statements to meet the pleading standards of Rule 9(b).

2.

Our conclusion that the complaint alleges that defendants made the statements in question by participating in the preparation of the prospectuses does not end our reliance inquiry. To satisfy the fraud-on-the-market theory, the defendant must make a "public misrepresentation." *Basic*, 485 U.S. at 248 n.27. In other words, the defendant must make a misrepresentation that is public and is attributable to the defendant. This requirement is necessary to ensure that the misleading information "is reflected in the market price of the security." *See Stoneridge*, 128 S. Ct. at 769. Here, the allegedly misleading statements about market timing appearing in the Janus funds prospectuses are unquestionably public. The real question is whether

these statements were sufficiently attributable to JCG and JCM. While the prospectuses did not explicitly name JCG and JCM as the drafters, plaintiffs nevertheless allege in their complaint that JCG and JCM may be held responsible for the statements in the prospectuses because "as a practical matter [JCM] runs" the Janus funds, J.A. 212, defendants disseminated the prospectuses on a joint Janus website and, consequently, the public would attribute the misstatements in the prospectuses to defendants.

The courts of appeal have diverged over the degree of attribution required to plead reliance. Disagreement regarding the requirement of attribution extends beyond the context of fraud-on-the-market reliance and traces its origins to the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). In *Central Bank* the Court concluded that there was no separate aiding and abetting liability in private securities actions. A defendant cannot be liable absent a "showing that the plaintiff relied upon the [defendant's] statements or actions." *Id.* at 180. The Court also made clear, however, that:

> The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5,

> assuming *all* of the requirements for primary liability under Rule 10b-5 are met.

Id. at 191 (emphasis in original).

Several courts have interpreted *Central Bank* to suggest that reliance under § 10(b), even outside the context of fraudon-the-market, requires direct attribution of the allegedly misleading statement to the defendant.

In *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), the Second Circuit concluded that "a secondary actor cannot incur primary liability under the [Securities Exchange] Act for a statement not attributed to that actor at the time of its dissemination." *Wright* involved a claim by shareholders in BT Office Products Inc. (BT) against Ernst & Young, an outside auditor for BT. The shareholders' claim centered on a statement of financial results in a BT press release setting forth the company's financial results and indicating strong growth. The BT shareholders claimed that Ernst & Young was responsible for the financial report despite the fact that the press release specifically stated that the figures were unaudited. Because Ernst & Young had approved the financial information contained in the press release, the shareholders contended that the market understood that the press release was an implied statement by Ernst & Young that the financial information in the press release was accurate. The court concluded that the shareholders had failed to adequately plead reliance. Quoting *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997), the court reasoned that

> "[i]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be

> held liable under § 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial the aid may be, it is not enough to trigger liability under Section 10(b)."

Wright, 152 F.3d at 175. Thus, "a defendant must know or should know that his representation would be communicated to investors." *Id.* (internal quotations removed).

Wright did not make clear, however, whether the statement itself must be attributed on its face to the defendant or whether a statement that the investing public would infer was drafted or approved by the defendant would qualify. The Southern District of New York's more recent decision in *Global Crossing* (discussed below) suggests that the latter may be sufficient to satisfy the attribution requirement.

The Eleventh Circuit has also adopted *Wright*'s public attribution language. *See Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001). "Following the Second Circuit," the court "conclude[d] that, in light of *Central Bank*, in order for the defendant to be primarily liable under § 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made." *Id.* at 1205. The Eleventh Circuit explicitly rejected the argument that "primary liability should attach to those who were never identified to investors as having played a role in the misrepresentations." *Id.* at 1206. And the First Circuit in dicta in an SEC enforcement action noted that "public attribution, like direct reliance, is necessary in a private [securities] action." *S.E.C. v. Tambone*, 550 F.3d 106, 139 (1st Cir. 2008).

The Ninth Circuit, in contrast, has concluded that public attribution is not required to plead reliance; substantial participation or intricate involvement in preparing the misleading statement is sufficient to state a primary violation of § 10(b). *See In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628-29 & n.3 (9th Cir. 1994); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000).

Finally, the Tenth Circuit has staked out what it perceives to be a middle ground. *See Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996); *see also S.E.C. v. Wolfson*, 539 F.3d 1249 (10th Cir. 2008). In *Anixter* the court considered the potential primary liability of an outside auditor for his alleged participation in preparing and filing registration statements, program books, and prospectuses, and his certifications and opinion letters verifying a company's overall financial health. The court explained that "[t]he critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the plaintiff." 77 F.3d at 1225. The court concluded that "[a]n accountant's false and misleading representations in connection with the purchase or sale of any security, if made with the proper state of mind and if relied upon by those purchasing or selling a security, can constitute a primary violation." *Id.* at 1226.

> [F]or an accountant's misrepresentation to be actionable as a primary violation, there must be a showing that he knew or should have known that his representation would be communicated to investors because § 10(b) and Rule 10b-5 focus on fraud made in

> connection with the sale or purchase of a security.

Id. (internal quotations omitted). That is, "in order for accountants to 'use or employ' a 'deception' actionable under the antifraud law, they must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors." *Id.*

Our court has declined to adopt either the direct attribution or substantial participation standard for pleading reliance. *See Gariety*, 368 F.3d at 369-70. Because the question in this case arises in the limited context of fraud-on-the-market, it is not necessary for us to establish an attribution standard for all reliance inquiries. As the Supreme Court has explained, "[t]he fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business," and "[m]isleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Basic*, 485 U.S. at 241-42 (internal quotations omitted). Consequently, for the public attribution element of the reliance inquiry, we hold that a plaintiff seeking to rely on the fraud-on-the-market presumption must ultimately prove that interested investors (and therefore the market at large) would attribute the allegedly misleading statement to the defendant. *See Global Crossing*, 322 F.Supp.2d at 334. At the complaint stage a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly infer that interested investors would have known that the defendant was responsible for

the statement at the time it was made, even if the statement on its face is not directly attributed to the defendant. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (clarifying pleading standards in context of 12(b)(6) dismissal). Direct attribution of a public statement, while undoubtedly sufficient to establish fraud-on-the-market reliance, is an inexact proxy for determining whether investors will attribute a publicly available statement to a particular person or entity. We conclude that the attribution determination is properly made on a case-by-case basis by considering whether interested investors would attribute to the defendant a substantial role in preparing or approving the allegedly misleading statement.

Here we must determine whether, based on JCM's duties as investment advisor to the Janus funds, JCG's role as an asset management firm and parent of JCM, and the two defendants' active dissemination of the Janus fund prospectuses, interested investors would have inferred that either or both defendants played a substantial role in drafting or approving the allegedly misleading prospectuses.

A number of courts, even in circuits that have adopted a direct attribution requirement, have concluded that in certain circumstances auditors and corporate officers may be responsible for statements issued by the corporation or analysts that were not directly attributed to the auditors or officers. For example, in *Global Crossing* the Southern District of New York determined that Arthur Andersen, an auditor whose role was "well-known to investors" in Global Crossing, could be liable for statements made by Global Crossing that Andersen reviewed and

approved but were not publicly attributed to it. 322 F.Supp.2d at 331. There, Andersen's audit reports

> were included in all of [Global Crossing (GC)]'s registration statements and annual reports from 1998 to 2000, and . . . were widely available to shareholders during the class period. Andersen's role as GC's auditor was thus well known to investors, who could easily have relied on the accounting firm's involvement in making any public financial reports, even where a particular statement was not publicly attributed to it.

Id. at 334. The district court further observed that:

> Andersen's aggressive marketing of the novel accounting strategies promoted in [a paper authored by Andersen], which allegedly "became a 'must read' in the telecom industry" . . . raises an inference that sophisticated investors would have known of Andersen's role in creating the reporting practices behind GC's false statements. These allegations are sufficient to raise a reasonable inference not only that Andersen was one of the "makers" of the statements, but also that investors viewed it as such.

Id.

The District of Massachusetts reached a similar conclusion in *In re Lernout & Hauspie Sec. Litig.*, 230 F.Supp.2d 152 (D. Mass. 2002). There, the court pointed out that:

> While [auditor] KPMG U.S. did not sign any of KPMG's allegedly fraudulent audit reports or [Lernout & Hauspie]'s financial statements, Plaintiffs allege that it played a

> significant role in drafting the financial statements and in conducting the audit, and that KPMG US's role as an auditor was publicly disseminated in the annual reports to shareholders.

Id. at 166. On the facts alleged regarding publicly available information about KPMG's role as an auditor for the company, the court concluded that "[i]t is . . . appropriate to infer that in 1998 and 1999, investors reasonably attributed the statements contained in the quarterly and annual reports to KPMG US." *Id.* at 167.

The Second Circuit has additionally held that plaintiffs may adequately plead reliance against corporate officers for statements appearing in analyst reports not directly attributed to the officers. In *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000), the Second Circuit rejected the contention that the plaintiffs had "not adequately alleged that statements made by securities analysts can be attributed to the . . . defendants [the corporation and high-level officers]" under the fraud-on-the-market theory of reliance. The court noted that in § 10(b) litigation a corporation and its officers could be liable for misleading information appearing in analyst reports when the corporation and its officers either "(1) 'intentionally foster[ed] a mistaken belief concerning a material fact' that was incorporated into reports; or (2) adopted or placed their 'imprimatur' on the reports." *Id.* (quoting *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 163-64 (2d Cir. 1980)) (alterations in original). The plaintiffs' complaint in *Novak* alleged, among other things, that the defendants made numerous misleading statements that were used by analysts in forming

their opinions about the prospects of the company. *See Novak v. Kasaks*, 997 F.Supp. 425, 427-28 (S.D.N.Y. 1998). The Second Circuit found sufficient attribution in the plaintiffs' allegations that the defendants "made misstatements that were later incorporated into analysts' reports and [the defendants] subsequently (at least implicitly) adopted the contents of those reports." 216 F.3d at 314.

In each of these cases, the courts analyzed the precise relationship between the defendant and the entity or analyst issuing the allegedly misleading statement in order to determine whether the statement was attributable to the defendant. We likewise look to the nature of the relationship between the defendants (JCG and JCM) and the Janus funds in the present case to determine whether statements in the Janus fund prospectuses were attributable to JCG or JCM.

According to the complaint, JCM in its role as investment advisor to the Janus funds "is responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds" and "furnishes advice and recommendations concerning the funds' investments, as well as administrative, compliance and accounting services for the funds." J.A. 206-07. "While each mutual fund is in fact its own company, as a practical matter the management company [that is, JCM] runs it." J.A. 212. And "[t]he portfolio managers who make the investment decisions for the funds and the executives to whom they report are all typically employees of the same management company, not the mutual funds themselves." J.A. 212.

Interested investors would know that JCM is listed as investment adviser to the funds in the prospectuses and the statements of additional information for each of the Janus funds, and its duties are detailed in these documents. For example, under the heading "Management of the Fund," the February 25, 2002, prospectus for the Janus Mercury Fund lists only an investment adviser, JCM,[3] and a portfolio manager, Warren Lammert, who was executive vice president of the fund. The Janus Mercury Fund prospectus explains that the investment adviser "furnishes continuous advice and recommendations concerning the Fund's investments" and "also furnishes certain administrative, compliance and accounting services for the Fund." J.A. 109. The February 25, 2002, statement of additional information for the Janus Equity and Income Funds (supplemented April 2, 2002, May 13, 2002, and May 31, 2002) further explains that JCM, as investment adviser, will "provide office space for the Funds, and pay the salaries, fees and expenses of all Fund officers and of those Trustees who are affiliated with [JCM]." J.A. 366. Pursuant to the advisory agreements between the funds and JCM, "[JCM] furnishes certain other services, including net asset value determination and fund accounting, recordkeeping, and blue sky registration and monitoring services, for which the Funds may reimburse [JCM] for its costs." *Id.*

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[3] At the time the investment advisor was called Janus Capital Corporation. It has since been renamed JCM, and we refer to it as JCM.

The statement of additional information also notes that Janus Distributors LLC, a wholly-owned subsidiary of JCM, is a distributor of the funds. And the District Court observed previously in a related action that two fund defendants in that action, Janus Investment Fund and Janus Adviser Series, are merely "trusts that hold assets belonging to shareholders of the fund." *In re Mut. Funds Inv. Litig.*, 384 F.Supp.2d 845, 852-53 n.3 (D. Md. 2005). The defendants in that litigation asserted that the Janus Investment Fund and Janus Adviser Series have no assets separate and apart from those they hold for shareholders. *Id.* at 853 n.3.

To the interested investor familiar with the organizational structure of mutual funds, plaintiffs' allegations here would have been readily known or ascertainable. Such an investor would understand that "[a] mutual fund does not operate on its own or employ a full time staff." Clifford E. Kirsch, Mutual Fund Organizational Structure Powerpoint Presentation, *in Nuts & Bolts of Financial Products 2005* (Practising Law Institute 2005), at 359. Consequently, "[m]ost of the operations of a mutual fund are carried out by service providers." Bibb L. Strench & Kathryn L. Quirk, The Advisory Relationship/Portfolio Management, Outline, *in The ABCs of Mutual Funds 2006* (Practising Law Institute 2006), at 207. As the SEC has explained,

> Unlike most business organizations . . . mutual funds are typically organized and operated by an investment adviser that is responsible for the day-to-day operations of the fund. In most cases, the investment adviser is separate and distinct from the

> fund it advises, with primary responsibility and loyalty to its own shareholders.

Role of Independent Directors of Investment Companies; Final Rule, 66 Fed. Reg. 3734, 3735 (Jan. 16, 2001); *see also* Strench & Quirk at 207 (noting that "the investment adviser[ ] is primarily responsible for the day-to-day management of the mutual funds' investment portfolio"). The investment adviser "determines the composition of assets of the mutual funds, including the instruments to be purchased, exchanged, retained or sold, the amounts of cash and other investments, and the timing of the execution of these actions." Strench & Quirk at 207. The SEC has also noted that "[a]s a result of their extensive involvement, and the general absence of shareholder activism, investment advisers typically dominate the funds they advise." 66 Fed. Reg. at 3735 n.3.

The inference that interested investors would attribute to JCM a role in the preparation or approval of the allegedly misleading prospectuses is further strengthened by the fact that JCG and JCM and the Janus funds held themselves out to the investing public as a single entity: "Janus." Defendants and the funds maintain a single website which contains prospectuses for all of the Janus funds and which is used to disseminate the prospectuses to the investing public. As the statement of additional information for the Janus Equity and Income Funds explains, "[p]romotional expenses in connection with offers and sales of shares are paid by [JCM]," J.A. 371, indicating an active role by JCM in the promotion and sale of shares in the Janus funds.

We conclude, at the Rule 12(b)(6) stage, that given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses, particularly the content pertaining to the funds' policies affecting the purchase or sale of shares. It was publicly known that JCM furnished advice and recommendations concerning the Janus funds' investment decisions and even made NAV determinations, which in part enabled market timing. In light of the publicly available material, interested investors would have inferred that if JCM had not itself written the policies in the Janus fund prospectuses regarding market timing, it must at least have approved these statements. This circumstance is sufficient to support the adequacy of plaintiffs pleading of fraud-on-the-market reliance as to JCM.

Our analysis is fully consistent with the Supreme Court's decision in *Stoneridge*. In *Stoneridge* purchasers of common stock in Charter Communications, Inc. (Charter) brought a § 10(b) action alleging violations by a number of parties including Scientific-Atlanta, Inc. and Motorola, Inc., two suppliers of Charter. According to the allegations, Charter engaged in economically substanceless transactions with suppliers that inflated Charter's revenue. 128 S. Ct. at 766-67. Suppliers in their own financial statements booked the transactions as a wash in accordance with generally accepted accounting principles. *Id.* at 767. On the facts before it the Court concluded that the suppliers' "deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance." *Id.* at 770. The Court reasoned that "[i]t was Charter, not respondents,

that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did." *Id.* While *Stoneridge* makes clear that the fraud-on-the-market presumption does not apply to transactions that are not publicly disclosed, the holding in *Stoneridge* has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant.

Finally, we hold that plaintiffs' allegations of attribution, while sufficient to implicate JCM in its role as investment advisor, are insufficient to reach JCG. As we have noted, an investment advisor is well known to be intimately involved in the day-to-day operations of the mutual funds it manages. We cannot say, however, that it would be apparent to the investing public that the investment advisor's parent company, which sponsors a family of funds, participates in the drafting or approving of prospectuses issued by the individual funds. Although JCG, like JCM, played a role in the dissemination of the fund prospectuses on the Janus website, this fact, taken by itself, is insufficient in this case for us to infer that interested investors would believe JCG had prepared or approved the Janus fund prospectuses.

B.

We turn next to the question of whether plaintiffs have successfully pled the element of loss causation.

In a § 10(b) case, "when courts require a showing of damages *proximately caused* by the defendant's

conduct for liability, they require only that the plaintiff show that the defendant's conduct was a *substantial* cause of its injury." *Miller v. Asensio & Co., Inc.*, 364 F.3d 223, 229 (4th Cir. 2004) (emphasis in original); *see also Teachers'*, 477 F.3d at 186. That is, "as long as the misrepresentation is one substantial cause of the investment's decline in value, other contributing forces will not bar recovery under the loss causation requirement." *Miller*, 364 F.3d at 233 (quoting *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447 n.5 (11th Cir. 1997)); *see also In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1025 (9th Cir. 2005) (same). The facts alleged in the complaint therefore need not conclusively show that the securities' decline in value is attributable solely to the alleged fraud rather than to other intervening factors. *See Miller*, 364 F.3d at 229 (noting that it is during the damages inquiry, not the earlier proximate cause inquiry, "that the exact amount of damages *solely* caused by the defendant's conduct must be calculated") (emphasis in original). As explained above, plaintiffs must plead loss causation "with sufficient specificity to enable [this] court to evaluate whether the necessary causal link exists." *Teachers'*, 477 F.3d at 186.

The complaint here adequately alleges that the false or misleading statements in the prospectuses drafted and disseminated by defendants were a substantial cause of the decrease in JCG's share price when the fraud was publicly revealed. The allegations are as follows. Materially misleading statements regarding defendants' policies on market timing fraudulently induced investors to purchase shares in the Janus funds, increasing the assets under management by JCM. JCM's management of the Janus funds' assets was responsible for

generating more than ninety percent of JCG's revenue. Consequently, any decrease in the value of the assets in the various mutual funds would adversely affect JCG's revenues and profits.

According to the complaint, when the New York Attorney General broke the news on September 3, 2003, that hedge funds had been permitted to market time the Janus funds, JCG stockholders were damaged in several ways. First, JCG stockholders were damaged directly when JCG was required to pay more than $325 million in fines and penalties to settle claims by regulatory agencies relating to the allegations of improper market timing. Second, JCG stockholders were damaged when the assets under management by JCM decreased by $14 billion between September 2003 and February 2004. The complaint alleges that the large withdrawal of assets during this period, which occurred at more than three and a half times the rate during the previous eight months, was causally connected to the Attorney General's revelations of fraud. Because JCG's profitability, as conceded in its Form 10-K, was directly linked to the amount of assets under JCM's management (that is, the amount of assets in the Janus funds), it was inevitable that the significant withdrawal of assets from the Janus funds would impact JCG's common stockholders.

Plaintiffs' allegations are therefore sufficiently specific to establish that the misleading statements in the prospectuses were a substantial factor in the decline in the value of JCG's common stock. Indeed, plaintiffs note that between September 2 and September 4, 2003, the days immediately preceding and following the public revelation of the Attorney General's complaint, the share price of JCG's

common stock dropped by 12.7 percent from $17.68 to $15.60. The rapid decline of JCG's common stock price following the news of market timing in the Janus funds indicates a substantial causal link between the misleading prospectuses used to sell shares in the Janus funds and the value of JCG's stock.

III.

We turn now to plaintiffs' allegations of scheme liability. Plaintiffs assert that:

> During the Class Period, defendants carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing public, including plaintiff and other Class members, as alleged herein and (ii) cause plaintiff and other members of the Class to purchase [JCG] securities at artificially inflated prices.

J.A. 242. Plaintiffs contend that JCG and JCM may be held liable under § 10(b) for their participation in this fraudulent scheme.

After plaintiffs filed their complaint, the Supreme Court decided *Stoneridge* and clarified the contours of scheme liability in private securities actions. Although *Stoneridge* did not eliminate scheme liability, the opinion made clear that for a secondary actor to be liable for securities fraud under § 10(b), that actor "must satisfy each of the elements or preconditions for liability." 128 S. Ct. at 769. That is, the existence of a fraudulent scheme does not permit a plaintiff to avoid proving any of the traditional elements of primary liability, such as scienter and reliance. Since we have already

analyzed the challenged elements for primary liability for each of the defendants above, there is no need for us to conduct a separate inquiry on scheme liability.

IV.

Given our conclusion that the complaint does not plead an adequate claim of primary liability against JCG, the final issue we must resolve is whether plaintiffs have successfully pled a claim of control person liability against JCG under § 20(a) of the Act. Pursuant to § 20(a):

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a) (2006). A claim of control person liability must allege: (1) a predicate violation of § 10(b) and (2) control by the defendant over the primary violator. *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1305 (10th Cir. 1998). "[O]nce the plaintiff establishes the prima facie case [of controll, the burden shifts to the defendant to show lack of culpable participation or knowledge." *Id.*

We have already determined that the predicate violation requirement has been met; plaintiffs have successfully pled a claim of primary liability against

JCM. To plead the control requirement, a plaintiff must

> plead[ ] facts showing that the controlling defendant "had the power to control the general affairs of the entity primarily liable at the time the entity violated the securities laws . . . [and] had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in the primary liability."

In re MicroStrategy, Inc. Sec. Litig., 115 F.Supp.2d 620, 661 (E.D. Va. 2000) (quoting *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396 (11th Cir. 1996) (alterations in original)). SEC regulations define "control" as "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 240.12b-2 (2008); *see also* H.R. Rep. No. 73-1383, at 26 (1934) ("[W]hen reference is made to 'control', the term is intended to include actual control as well as what has been called legally enforceable control."). In making the determination of whether a defendant possessed the requisite control, "the courts have given heavy consideration to the power or potential power to influence and control the activities of a person, as opposed to the actual exercise thereof." *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 890-91 (3d Cir. 1975). And, ultimately, as a "complex factual question," *S.E.C. v. Coffey*, 493 F.2d 1304, 1318 (6th Cir. 1974), assessing control person liability is "not ordinarily subject to resolution on a motion to dismiss," and dismissal should be granted only when "a plaintiff does not plead any facts from which it can

reasonably be inferred the defendant was a control person," *Maher*, 144 F.3d at 1306; *see also In re Cabletron Sys., Inc.*, 311 F.3d 11, 41 (1st Cir. 2002) ("Control is a question of fact that 'will not ordinarily be resolved summarily at the pleading stage.' The issue raises a number of complexities that should not be resolved on such an underdeveloped record.") (quoting 2 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 12.24(1) (4th ed. 2002)) (internal citation omitted).

Plaintiffs' allegations adequately plead control of JCM by JCG. First, plaintiffs have alleged that JCG wholly owned JCM. The Eleventh Circuit has specifically noted that "[t]he legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws." *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008) (citing H.R. Rep. No. 73-152, at 12 (1933)). Regarding control in the corporation context, one commentator explained:

> An enterprise may control another organization and, indirectly, that organization's agents and employees. An enterprise's section 15 or 20(a) control of another organization may arise from virtually any source on which any other controlling person's status can be based. For example, a corporation may be a controlling person when it owns the majority of the shares of another corporation on the basis of its authority to control (legal control) the subsidiary.

Loftus C. Carson, II, The Liability of Controlling Persons Under the Federal Securities Acts, 72 *Notre Dame L. Rev.* 263, 314 (1997); *see also Borden, Inc. v. Spoor Behrins Campbell & Young, Inc.*, 735 F.Supp. 587, 590-91 (S.D.N.Y. 1990) (holding that plaintiffs' allegation that defendants were sole shareholders of the allegedly controlled corporation "clearly meets" the § 20(a) standard).

Second, plaintiffs have alleged that JCG and JCM shared a common director, Helen Hayes. Hayes was both a director of JCG during the class period and Managing Director of Investments and a portfolio manager at JCM. The complaint alleges that "[s]he served in a day-to-day supervisory position at [JCM] and had the power to control its operations." J.A. 245. Additionally, Mark Whiston, the CEO and President of JCG during part of the class period, was previously President of Retail and Institutional Services at JCM. The complaint alleges that Whiston commissioned an inquiry into market timing in the Janus funds. The complaint also includes an excerpt from a September 5, 2003, press release by JCG in which Whiston is quoted as saying that he had long viewed market timing as an industry-wide problem and that "[i]t's our hope that the [anti-market timing] measures [JCG is] announcing today will help resolve this situation in a way that recognizes the importance of the matter." J.A. 233. The complaint alleges that "[a]cting on behalf of [JCG], Mr. Whitson [sic], and through him, [JCG], had and exercised the power to control the activities of [JCM]." J.A. 245.

Finally, the complaint quotes passages from the New York Attorney General's complaint in which JCG employees discuss market timing policies and

actions taken to prevent timing in a manner indicating presumptive control over the market timing activities. Specifically, the complaint includes a comment from an unnamed JCG source that states: "Our stated policy is that we do not tolerate timers. As such, we won't actively seek timers, but when pressed and when we believe allowing a limited/controlled amount of timing will be in JCG's best interests (increased profitability to the firm) we will make exceptions under these paramaters [sic]." J.A. 232 (emphasis added).

Taken together, plaintiffs' allegations of complete ownership of JCM by JCG, overlapping management between JCG and JCM, control of JCM by JCG executives, and presumptive authority by JCG to regulate market timing activity in the Janus funds are sufficient to plead a prima facie case of control person liability.

V.

In sum, we conclude that plaintiffs have pled a viable claim of primary § 10(b) liability against JCM and have adequately pled that JCG may be liable as a control person of JCM under § 20(a). We therefore reverse the district court's grant of defendants' motion to dismiss as to both defendants. We remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

SHEDD, Circuit Judge, concurring:

I concur in the judgment of the majority that liability may be imposed as to both JCM and JCG. The majority holds that JCM may be primarily liable under § 10(b) and JCG may be liable as a control person under § 20(a). While I agree with these

holdings, I would also hold that the plaintiffs have properly plead a claim that JCG is primarily liable for making false statements in the Janus funds' prospectuses under § 10(b). I believe JCG's alleged involvement and facilitating access to the false statements is sufficient to impose primary liability on JCG.

In order to plead a proper case that JCG is primarily liable, a plaintiff must plead, among other elements, that JCG made a misrepresentation that is public and attributable to JCG. As the majority correctly holds, "the Janus funds prospectuses are unquestionably public." *Majority Op.*, at 16. Thus, the only question is whether the plaintiffs have properly plead a basis that the statements are sufficiently attributable to JCG as a "maker" of the false statement. I believe they have done so. In their complaint, the plaintiffs allege that JCG

> makes the most recent prospectus for each Janus Fund available on its website, *www.janus.com*. These prospectuses, which are given to prospective shareholders, included language that said Janus' funds were not intended for market timing or excessive trading and said Janus had measures in place to stop the trading. These statements were materially false and misleading.

J.A. 212-13. (internal quotation marks omitted). I believe the plaintiffs have properly alleged that JCG made a false statement by publishing these funds' prospectuses on its website, and a reasonable investor would attribute these public statements to JCG.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MUTUAL FUNDS INVESTMENT LITIGATION	*	MDL-15863
	*	
CRAIG WIGGINS, et al.	*	
	*	
v.	*	Civil No. JFM-04-818
	*	
JANUS CAPITAL GROUP INC., et. al.	*	
	*	
	*	
	*****	

OPINION

This action is part of the MDL proceeding arising from late trading and market timing in the mutual funds industry.[1] According to the allegations in the Second Amended Complaint ("SAC"), one of the

[1] The reader's familiarity with the basic facts giving rise to this MDL is presumed. For an explanation of late trading and market timing, *see In re Mutual Funds Investment Litigation*, 384 F. Supp. 2d 845, 852 n.1 (D. Md. 2005).

defendants, Janus Capital Group Inc. ("JCG"), is "an asset management firm that launched mutual funds known as the 'Janus Funds.'" (SAC ¶ 2.) The other defendant, Janus Capital Management LLC ("JCM"), is a wholly-owned subsidiary of JCG that manages the Janus Funds and serves as the investor adviser to them. (*Id.*) Plaintiffs, purchasers of JCG stock, assert that the defendants stated publicly through prospectuses issued by the mutual funds that they prohibited market timing in their funds, while in fact they permitted certain hedge funds to engage in such trading. The revelation of these secret arrangements in September 2003 exposed the defendants to regulatory penalties and allegedly prompted mutual fund investors to withdraw their investments, all of which caused a significant drop in the price of JCG's stock.

Against this background, plaintiffs have instituted this "parent investor class action," asserting that JCG and JCM violated section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Plaintiffs also assert a control person claim against JCG under section 20(a) of the Exchange Act. 15 U.S.C. § 78t(a). JCG and JCM move pursuant to Rule 12(b)(6) to dismiss plaintiffs' SAC. For the reasons that follow, I will grant the motion.

Section 10(b) Claim Against JCG

"'To state a claim under section 10(b) and Rule 10b-5, a plaintiff must allege that . . . the defendant made a false statement or omission of material fact . . . .'" *In re Royal Ahold NV. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 368 (D. Md. 2004) (quoting *Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d

338, 342 (4th Cir. 2003)). Moreover, the Private Securities Litigation Reform Act ("PSLRA") requires a complaint to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). The Fourth Circuit recently explained how the PSLRA affects the analysis of a motion to dismiss securities fraud claims. *See Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162 (4th Cir. 2007). The court said:

> [W]hile the Federal Rules generally allow a court, in ruling on a motion to dismiss under Rule 12(b)(6), to take into account *any set of facts that could be proved* consistent with the allegations of the complaint, even though such facts have not been alleged in the complaint, the PSLRA modifies this scheme (1) by requiring a plaintiff *to plead facts* to state a claim and (2) by authorizing the court to assume that the plaintiff has indeed stated *all* of the facts upon which he bases his allegation of a misrepresentation or omission.

Id. at 172 (emphasis in original).

Plaintiffs in the present action maintain that certain disclosures in the Janus Fund prospectuses misstated the policies regarding market timing and late trading that were being followed in the funds.[2]

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[2] Plaintiffs initially contended that JCG's publicly filed financial results were also misleading. According to plaintiffs, in exchange for the ability to engage in market

[Footnote continued on next page]

(SAC ¶¶ 138-52.) In particular, the prospectuses stated that the funds were "not intended for market timing or excessive trading and that "Janus had measures in place to stop the trading," when in fact the defendants permitted several hedge funds to engage in market timing transactions. (*Id.* ¶ 38.) Plaintiffs claim that JCG assisted in the preparation and filing of these allegedly misleading prospectuses and therefore should be deemed to have made these statements.

The Supreme Court has held, however, that there is no aiding and abetting liability in private securities fraud actions. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). After the *Central Bank* decision, the circuits developed various tests to distinguish between mere aiding and abetting and actionable primary violations of the securities laws. *See Royal Ahold*, 351 F. Supp. 2d at 370-71. In the Fourth Circuit, a misrepresentation must be "directly attributable to [the defendant] and not to some other person."

[Footnote continued from previous page]

timing, the hedge funds parked "sticky assets" in certain Janus funds, thereby distorting the assets under management. (SAC ¶¶ 53, 85.) Plaintiffs, however, devoted only a footnote to the financial statements argument in their memorandum in opposition to the motion to dismiss, and at the hearing before this Court their counsel confirmed that the focus of this case has always been the allegedly misleading mutual fund prospectuses.

Gariety v. Grant Thornton, LLP, 368 F.3d 356, 369 (4th Cir. 2004).[3]

The SAC in the present action contains no allegations that JCG actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it. Plaintiffs concede as much, arguing that "[t]he fact that the prospectus statements were not specifically attributed to defendants does not warrant dismissal." (Pl.'s Mem. Opp'n Defs.' Mot. Dismiss at 28.) According to plaintiffs, the fact that the mutual fund prospectuses bore Janus' logo, name, and website should alone render JCG liable for the allegedly misleading statements. This proposition, however, is far from self-evident, and plaintiffs cite no authority in support of it.

Plaintiffs further suggest that "[w]hether or not defendants drafted the misleading prospectuses, they clearly were actively involved in the dissemination of the misrepresentations with knowledge that the statements were false and misleading." (*Id.* at 31.) The SAC does contain a number of allegations regarding JCG's role in distributing the prospectuses. However, assuming that the authorities plaintiffs rely upon in making this

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[3] It is not entirely clear from *Gariety* itself whether the Fourth Circuit was adopting the "directly attributable to" test or was simply noting that the defendant was urging the court to apply this test. Any ambiguity on this point, however, was resolved in the Fourth Circuit's subsequent unpublished decision in *Glaser v. Enzo Biochem, Inc.*, 126 F. App'x 593, 598-99 (4th Cir. 2005), where the court, citing *Gariety*, clearly expressed that the "directly attributable to" test was the law of the Circuit.

argument are consistent with Fourth Circuit law, they do not support the contention that the dissemination of fund prospectuses alone was sufficient to expose JCG to liability. For example, *In re MTC Electronic Technologies Shareholder Litigation*, 993 F. Supp. 160, 161-62 (E.D.N.Y. 1997) held that an underwriter could be liable for preparing and disseminating a misleading prospectus, because of the "central role underwriters play in the issuance of securities and the special reliance placed on them by prospective investors." Importantly, the court limited its holding to underwriters and said that all other participants in securities offerings must literally make the allegedly false statements in order to be liable under Rule 10b-5. *Id.* at 162; *see also In re Livent, Inc. Noteholders Sec. Litig.*, 174 F. Supp. 2d 144, 154-55 (S.D.N.Y. 2001) (finding, without discussing whether the dissemination of a document could impose liability, that an investment bank had communicated a misleading statement through its solicitation and sales of the issuer's securities).

Other courts have simply rejected the proposition that dissemination of a misleading document is tantamount to making a misstatement for securities fraud purposes. *See SEC v. Tambone*, 417 F. Supp. 2d 127 (D. Mass. 2006). In *Tambone*, the SEC alleged that a broker-dealer's executives permitted market timing and excessive trading in certain mutual funds while fund prospectuses stated that such trading was prohibited. *Id.* at 130. Although the two defendants clearly had not prepared, drafted, or signed the allegedly misleading prospectuses, the SEC argued that their communication and dissemination of the offering documents subjected them to liability. *Id.* at 133. The court rejected that argument, not only

because the complaint did not allege that the individual defendants themselves "controlled, supervised or played any role in the distribution of the prospectuses," *id.* at 134, but also (and more fundamentally) because "the SEC's claims of primary liability through dissemination does not [sic] withstand the weight of contravening case law. *Id.*; *see also Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355, 367 (E.D.N.Y. 2000) (refusing to hold a public relations firm liable for distributing another company's misleading press release where the firm was "merely a conduit" for that other company's statements).

For these reasons, I find that plaintiffs have not alleged facts sufficient to support their conclusory averment that JCG made a material misstatement or omission. I note that this holding is not inconsistent with my earlier ruling that the mutual fund shareholders themselves could state section 10(b) claims against JCG and JCM. *See In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845 (D. Md. 2005). In the mutual fund shareholders case, the plaintiffs asserted omissions and fraudulent *scheme* claims, *id.* at 853, and I denied JCG's and JCM's motion to dismiss not because I found they had themselves made material misstatements or omissions but because of their purported role in the alleged fraudulent scheme. In the present case, although the alleged fraudulent scheme is mentioned as a background fact in the SAC, plaintiffs do not assert scheme liability on the part of defendants. Nor could they do so. The gravamen of the alleged scheme underlying all of this MDL litigation is that mutual fund shareholders were the intended victims of the fraudulent scheme, not the shareholders of the corporate parent of fund advisers. It is for that

reason that plaintiffs here have contended that JCG itself made material misstatements, and, as I have discussed, this contention is unsupported by the facts alleged in the SAC.

Claim Against JCM

A plaintiff in a section 10(b) action must demonstrate that the alleged fraud occurred in connection with the purchase or sale of a security. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).[4] On February 27, 2006, I ruled in the

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[4] In light of my holding above that JCG did not make a material misstatement, I need not resolve an alternative argument offered by JCG that any misstatements contained in mutual fund prospectuses were not made "in connection with the sale of JCG stock because they were directed to mutual fund shareholders. I note, however, that in all likelihood I would not grant JCG's motion to dismiss on that ground. *In re Carter-Wallace, Inc. Securities Litigation*, 150 F.3d 153 (2d Cir. 1998), clearly stands for the proposition that statements directed to persons other than shareholders of a defendant may be deemed to be "in connection with" the sale of the defendant's securities if they have a material impact upon the value of the defendant's securities. While I have some concern about the potential breadth of the *Carter-Wallace* doctrine, this case – where the alleged misstatements were made in securities markets and allegedly had a significant impact upon the value of JCG stock – does not appear to be the appropriate vehicle for defining the limits of that doctrine, particularly absent the development of a factual record through discovery.

I also note that development of a factual record would be necessary before deciding another argument made by defendants that the alleged misstatements did not cause plaintiffs to suffer any loss. *See generally Dura Pharms.*, 544 U.S. at 341-46.

Putnam Subtrack that Putnam Investment Management, LLC, a mutual fund investment adviser, owed no duty to its parent's shareholders, because the latter never purchased or sold Putnam mutual funds. *Frederic Ian Fischbein PC v. Marsh & McLennan Cos.*, No. MDL-15863, Civ. JFM-04-1873, 2006 WL 734483, at *1 (D. Md. Feb. 27, 2006). As a result, I dismissed the shareholders' section 10(b) claim, which was based on allegedly misleading statements in Putnam mutual fund prospectuses and manipulative acts committed by Putnam. *Id.*

That ruling mandates the dismissal in the present action of plaintiffs' section 10(b) claim against JCM.[5] As in the Putnam Subtrack case, there is no nexus between plaintiffs, as JCG shareholders, and JCM, the funds' investment adviser. The authorities on which plaintiffs rely to distinguish the Putnam Subtrack opinion are inapposite. For instance, in *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000), the court found that shareholders in one corporation may have stated securities fraud claims against another company. Unlike the claims in the Putnam Subtrack and the instant action, however, the cause of action in *Semerenko* arose in the course of a tender offer, where the offeror's misrepresentations allegedly affected the price at which the plaintiffs purchased shares in the target corporation. *Id.* at 169-70. No such nexus exists in the present case.

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[5] Because I find that my ruling in *Fischbein* is dispositive of plaintiffs' claim against JCM, I need not decide whether JCM made the alleged misstatements upon which plaintiffs rely.

Another case relied upon by plaintiffs is *Muzinich & Co. v. Raytheon Co.*, No. CV-01- 284-S-BLW (D. Idaho Apr. 30, 2002). It too is distinguishable from the present case. In Muzinich, Raytheon was held potentially liable to shareholders of Washington Group International ("WGI") for misrepresentations it allegedly made about the value of a subsidiary that it was selling to WGI. According to the court's description of plaintiffs' allegations, "Raytheon prepared financial reports that assigned revenue to [the subsidiary] from contracts that never closed, and projected profits on other projects that Raytheon knew were false." *Id.* at 2. Moreover, plaintiffs alleged that "Raytheon knew that these false financials would be included in WGI's Form 10-K filings with the Securities and Exchange Commission . . . and that investors would rely on the Form 10-Ks." *Id.* Thus, although Raytheon never entered into a direct relationship with the members of the plaintiff class as did the tender offeror/defendant in *Semerenko*, it did make misrepresentations that it allegedly knew would be specifically relied upon by purchasers of WGI stock and that allegedly had the direct effect of inflating the value of that stock. In other words, the correlation between the defendant's misrepresentations and the harm allegedly suffered by plaintiffs was far stronger and more direct than that involved here.

Plaintiffs also cite *Zelman v. JDS Uniphase Corp.*, 376 F. Supp. 2d 956 (N.D. Cal. 2005). In that case JDS – which allegedly made misrepresentations concerning its financial health – was held to be potentially liable to purchasers of equity-linked debt securities issued by UBS, a Swiss bank, because the

value of the debt securities was directly linked to the value of JDS stock.

Here, although there is arguably a causal connection between the misrepresentations JCM is alleged to have made to investors in the Janus Funds and the value of JCG stock purchased by the plaintiffs, the connection is more tenuous than the direct ties between the securities' values involved in *Zelman*.

Additionally, despite plaintiffs' assertions to the contrary, *In re WorldCom, Inc. Securities Litigation*, No. 02 Civ. 3288 (DLC), 2004 WL 1435356 (S.D.N.Y. June 28, 2004) is unlike the present case. There, because research reports issued by Salomon Smith Barney ("SSB") allegedly contained material misstatements and omissions about WorldCom, SSB and its affiliated defendants were held to be potentially liable to plaintiffs who purchased equity-linked debt securities issued by SSB that were tied to the trading price of WorldCom common stock. Again, there was a direct connection between the value of WorldCom stock and the SSB debt securities.[6]

In short, I find that the circumstances of the cases relied upon by plaintiffs are unlike those

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[6] *Muzinich*, *Zelman*, and *WorldCom* would all tend to support the proposition established by *Carter-Wallace* that if (contrary to what I have found) JCG made misrepresentations to mutual fund shareholders, the fact that the misrepresentations were not specifically targeted at JCG shareholders would not necessarily insulate JCG from liability to its shareholders in a section 10(b) action. However, as I have earlier indicated, I need not address the *Carter-Wallace* doctrine here. *See supra* note 4.

presented here, and I remain of the view I expressed in *Fischbein* that a mutual fund investment adviser that allegedly made misrepresentations to mutual fund shareholders cannot be liable under section 10(b) to its parent's shareholders who purchased no mutual fund shares.[7]

Section 20(a) Claim Against JCG

Finally, plaintiffs assert that JCG is liable as a control person under section 20(a) of the Exchange Act for JCM's violations of section 10(b) and Rule 10b-5. (SAC ¶¶ 136-40.) Absent a primary violation of section 10(b), however, a control person claim fails. *See Frederic Ian Fischbein PC*, 2006 WL 734483, at *3. In light of plaintiffs' failure to plead a section 10(b) claim against JCM, the section 20(a) claim against JCG must be dismissed as well.

A separate order effecting the rulings made in this opinion is being entered herewith.

Date: May 21, 2007 /s/
J. Frederick Motz
United States District Judge

[7] Plaintiffs seek to distinguish my opinion in *Fischbein* on the additional grounds that (1) JCM, unlike the parent's operating subsidiary in Putnam, accounts for almost all of JCG's revenues, and (2) JCM's officers are also officers of JCG. Neither of these facts is material to the dispositive legal issue that JCM owed no duty to JCG shareholders under the circumstances of this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MUTUAL FUNDS INVESTMENT LITIGATION	* *	MDL-15863
	*	
CRAIG WIGGINS, et al.	*	
	*	
v.	*	Civil No. JFM-04-818
	*	
JANUS CAPITAL GROUP INC., et. al.	* * *	
	*	
	*****	

ORDER

For the reasons stated in the accompanying opinion, it is, this 21st day of May 2007

ORDERED

1. The defendants' motion to dismiss is granted; and

2. This action is dismissed.

/s/

J. Frederick Motz
United States District Judge

APPENDIX D

FILED: June 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1607
(1:04-cv-00818-JFM
(1:04-md-15863-JFM)

In re: MUTUAL FUNDS INVESTMENT LITIGATION,

FIRST DERIVATIVE TRADERS, on behalf of itself and all others similarly situated,

Plaintiff – Appellant

and

CRAIG WIGGINS, individually and on behalf of all others similarly situated,

Plaintiff

v.

JANUS CAPITAL GROUP, INCORPORATED, f/k/a Stilwell Securities Laws Financial, Incorporated; JANUS CAPITAL MANAGEMENT,

Defendants – Appellees

and

MARK B. WHISTON; LOREN M. STARR; GREGORY A. FROST,

Defendants

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In re MUTUAL FUNDS INVESTMENT LITIGATION	:	MDL No. 1586
This Document Relates To:	:	
In re Alger, Columbia, Janus, MFS, One Group, Putnam, and PIMCO, Civil Action No. 04-md-15863	:	
CRAIG WIGGINS, *et al.*	:	Civil Action No. 04-cv-00818
V.	:	
JANUS CAPITAL GROUP, INC., *et al.*	:	

SECOND AMENDED COMPLAINT FOR THE JANUS PARENT INVESTOR SUB-SUBTRACK

1. This is a federal class action brought by the Plaintiff on behalf of itself and a Class consisting of all other persons who purchased or otherwise acquired the publicly traded securities of Janus Capital Group Inc. (f/k/a Stilwell Financial Inc.) ("Janus Capital" or "the Company"), between July 21, 2000 and September 2, 2003, inclusive (the "Class Period"), and who still held Janus Capital shares as of September 3, 2003, and who therefore were damaged as a result of defendants' misconduct, seeking to recover damages caused by Defendants' violations of federal securities laws and pursue remedies under the Securities Exchange Act of 1934 (the "Exchange Act").

NATURE OF THE CLAIM

2. Janus Capital is an asset management firm that launched mutual funds known as the "Janus Funds." Janus Capital manages the Janus Funds through its wholly-owned subsidiary Janus Capital Management LLC ("Janus Management"). Janus Management serves as investment advisor to the Janus Funds, and, in that capacity is responsible for the funds' day-to-day management. The bulk of Janus Capital's revenues come from its creation and operation, directly or through subsidiaries, of the Janus Funds (which, collectively, as of April 2004 had $145 billion of assets under management). Defendants Janus Capital and Janus Management are referred to herein collectively as "Janus."

3. The investment management services provided to the Janus Funds were performed pursuant to advisory contracts, which provide for

fees payable to the Janus company that manages the account. The amount of the fees varies depending on the individual mutual fund or account, and is usually based in substantial part on the level of assets under management.

4. Janus Capital's revenue is derived primarily from investment management and 12b-1 fees received from the Janus Funds. Investment advisory revenues depend largely on the total value and composition of assets under management.

5. Janus represented that its mutual funds were designed to be long-term investments for "buy and hold" investors and were therefore favored investment vehicles for retirement plans. Certain investors, however, have attempted to use mutual funds to generate quick profits by rapidly trading in and out of certain mutual funds. Typically, these so-called "market timers" seek to capitalize on stale fund prices, often focusing on price discrepancies involving international funds – where the stocks that comprise the fund trade on exchanges whose operating hours are different from those of U.S. markets. Market timers take advantage of price inequities, but do so at the expense and to the detriment of long-term shareholders.

6. Defendants caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that defendants would implement measures to curb market timing in the Janus Funds. As recognized in the prospectuses, Janus' purported market timing policy was designed to protect long-term investors from the negative effects of excessive trading, including, but not limited to: dilution of share value,

negative tax consequences, increased transaction costs, and loss of fund investment opportunities.

7. The accuracy of defendants' representations concerning market timing restrictions were of utmost importance to investors in the Janus Funds. Long-term holders would be less likely to invest in Janus Funds absent protection against market timing. Because Janus Capital's revenue depends on attracting and keeping fund investors, and because Janus Capital faces liability exposure if it or its employees or its controlled subsidiaries are found to have misrepresented a fundamental policy, the accuracy of these representations is also material to investors in the common stock of Janus Capital Group.

8. Unbeknownst to Janus fund investors and to Janus Capital common stock investors, throughout the class period Janus was secretly operating many of the Janus funds in a manner inconsistent with Janus' publicly-stated policies concerning market timing. New York Attorney General Elliot Spitzer found, in his investigation of the mutual fund industry, that Janus had entered into secret arrangements with several hedge funds whereby Janus agreed to allow market timing transactions by those hedge funds and agreed to suspend the fees and other measures that Janus had in place to deter market timing. The Attorney General's evidence includes emails from Richard Garland, who was the former head of Janus' international operations and who reported directly to former Chief Executive Officer, Mark Whitson. In the emails, Garland advocates allowing a hedge fund to engage in market timing in exchange for a payoff, notwithstanding Janus' publicly-stated policies against such

transactions. Furthermore, according to Attorney General Spitzer, knowledge of the misconduct went "up to the very senior levels in the management to the Janus funds." In fact, at least one market source claimed to have uncovered a memo evidencing Mr. Whitson's direct knowledge of the market timing activity in 2002. Following the filing of Attorney General Spitzer's complaint, Janus admitted to having engaged in secret market timing arrangements with hedge funds during the period of November 2001 through April 2003.

9. In the wake of the Attorney General's release of its evidence in September 2003, and Janus' own subsequent admissions, several Janus executives were forced to resign, including the Chief Executive Officer, Mark Whitson; Lars Sodenberg, who headed Janus' institutional business; and Richard Garland, who headed Janus' international operations. Furthermore, Janus ultimately paid more than $325 million in fines and penalties to settle claims by various regulatory agencies.

10. Needless to say, the realization that Janus had lied about the policies allegedly in place to protect long-term investors caused a tremendous erosion of trust and confidence among mutual fund investors. The revelations by the Attorney General and subsequent admissions by Janus triggered an unprecedented level of divestiture from the Janus Funds. In the six months between September 2003 and February 2004, investors withdrew $14 billion from the Janus Funds, more than triple the rate of withdrawals for the previous six months. Relatedly and predictably, Janus' exposure to regulatory penalties and the exodus of mutual fund investors caused a crisis in confidence among Janus Capital

Group common stock investors. Thus, the price of Janus Capital Group common stock plummeted approximately 25% from $17.86 on September 2, 2003 to $13.50 on September 26 of that year, as news of the previously-concealed market timing arrangements became known to the public. This diminution in the value of the shares that class members purchased at artificially inflated prices during the class period caused injury to class members.

JURISDICTION AND VENUE

11. The claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act, (15 U.S.C. §§ 78j(b) and 78t(a)), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

12. This court has jurisdiction over the subject matter of this action pursuant to § 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331.

13. Venue was proper in the District of Colorado (where this action was initially commenced) pursuant to Section 27 of the Exchange Act and 28 U.S.C. § 1391(b) because Janus Capital and Janus Management are headquartered in that District, and many of the acts and practices complained of herein occurred in substantial part in that District. This action is currently pending in the District of Maryland pursuant to order of the Judicial Panel on Multidistrict Litigation.

14. In connection with the acts, conduct and other wrongs alleged in this amended complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to the United States mails,

interstate telephonic communications and the facilities of the national exchange.

THE PARTIES

15. Lead Plaintiff, First Derivative Traders, purchased Janus Capital securities during the class period, and held many of those shares through the price declines that resulted from the corrective disclosures on and after September 3, 2003 (which are described in paragraphs 91, 105-112, *infra*), as set forth in the certification filed at the time this law suit was initially commenced. As a result of the foregoing, lead plaintiff has suffered damages as a result of the wrongful acts of defendants as alleged herein.

16. Defendant Janus Capital is a corporation organized and existing under the laws of Delaware with its principal place of business located at 100 Fillmore Street, Denver, Colorado 80206. Janus Capital is the product of a merger of Janus Capital Corporation into Stilwell Financial, Inc.

17. According to Janus Capital's Form 10-K for the period ended December 31, 2002, the Company "sponsors, markets and provides investment advisory, distribution and administrative services primarily to mutual funds...." Fees from the management of mutual funds have constituted more than 90% of the Company's revenue and income. The management of the Janus Funds is not merely a small division of some huge conglomerate's business. Managing and advising mutual funds is Janus Capital's primary business.

18. Defendant Janus Capital Management LLC ("Janus Management") is a wholly-owned subsidiary of Janus Capital Group, and is located at 100

Fillmore Street, Denver, Colorado 80206. According to the Janus Mercury Fund February 28, 2003 prospectus, Janus Management (together with its predecessors) has served as investment advisor to the Janus Funds since 1970, and currently serves as the investment advisor to all of the Janus Funds, acts as sub-advisor for a number of private-label mutual funds, and provides separate account advisory services for institutional accounts. Janus Management, as investment advisor to the funds, is responsible for the day-to-day management of its investment portfolio and other business affairs of the funds. Janus Management furnishes advice and recommendations concerning the funds' investments, as well as administrative, compliance and accounting services for the funds, and the funds pay Janus Management a management fee, which is calculated daily and paid monthly.

CLASS ACTION ALLEGATIONS

19. Plaintiff brings this action as a federal class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of a class (the "Class"), consisting of those who purchased the securities of Janus Capital between July 21, 2000 and September 2, 2003, inclusive (the "Class Period"), and who still held Janus Capital shares as of September 3, 2003. Excluded from the Class are defendants, the officers and directors of Janus Capital and its subsidiaries, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

20. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, Janus Capital common

shares were actively traded on the New York Stock Exchange ("NYSE"). While the exact number of Class members is unknown to plaintiff at this time and can only be ascertained through appropriate discovery, plaintiff believes that there are hundreds or thousands of members in the proposed Class. During the class period, Janus Capital had more than 235 million shares outstanding, and average daily trading volume is significantly in excess of 1 million shares. Record owners and other members of the Class may be identified from records maintained by Janus Capital or its transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

21. Plaintiff's claims are typical of the claims of the members of the Class, as all members of the Class were similarly affected by defendants' wrongful conduct in violation of federal law that is complained of herein.

22. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation.

23. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether the federal securities laws were violated by defendants' acts as alleged herein;

(b) whether statements made by defendants to the investing public during the Class Period misrepresented material facts about the

business, operations, and management of Janus Capital and its subsidiaries including the Janus Funds and their managers;

(c) whether defendants breached any duty to convey material facts or to correct material facts previously disseminated;

(d) whether the defendants acted willfully, with knowledge or recklessly, in omitting and/or misrepresenting material facts;

(e) whether the market prices for Janus Capital securities were artificially inflated as a result of defendants' conduct;

(f) whether the decline in the market prices for Janus Capital securities beginning in September 2003 resulted from corrective disclosures of facts that were previously misrepresented or omitted by defendants; and

(g) to what extent the members of the Class have sustained damages and the proper measure of damages.

24. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for many members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

BACKGROUND

The Problem with Market Timing

25. Mutual funds are meant to be long-term investments. They are designed for buy-and-hold investors, and thus are the favored repository for long-term goal oriented investment accounts. In spite of this, quick-turnaround traders frequently try to trade in and out of certain mutual funds in order to exploit the inefficiencies in the way they set their Net Asset Values ("NAVs").

26. "Market timers" seek to capitalize on the fact that some funds use "stale" prices to calculate the value of securities held in their portfolio, prices which do not necessarily reflect the "fair value" of such securities as of the time the NAV is calculated. A typical example is a U.S. mutual fund that holds Japanese shares. Due to the time zone difference, the Japanese market may close at 2:00 a.m. New York time. If the U.S. mutual fund manager uses the closing prices of the Japanese shares in her fund to calculate an NAV at 4:00 p.m. in New York, she is relying on market information that is fourteen hours old. Any positive market moves during the New York trading day that will likely cause the Japanese market to rise when it later opens will not be reflected in the "stale" Japanese prices, and thus the overall fund's NAV will be artificially low. A trader who buys the Japanese fund at the "stale" price is virtually assured of a profit that can be realized the next day by selling. This and similar strategies are known as "time zone arbitrage." Taking advantage of this kind of short-term arbitrage repeatedly in a single mutual fund is called "timing" the fund.

27. Effective timing captures an arbitrage profit, which comes dollar-for-dollar from the pockets

of long-term investors. The timer steps in at the last minute and takes part of the buy-and-hold investors' upside when the market goes up; and as a result the next day's NAV is reduced for those who are still in the fund. Conversely, if the timer sells short on days market prices are falling, the arbitrage has the effect of making the next day's NAV lower than it would otherwise have been, thus magnifying the losses that investors are experiencing in a declining market.

28. Besides the wealth transfer of arbitrage (known as "dilution"), timers also harm their target funds by imposing unnecessary transaction costs on the funds through their frequent trading.

The Importance of Anti-Market Timing Safeguards

29. Were investors aware that the Janus Funds were subject to dilution and were being saddled with extra costs as a result of market timers, they would be far less attracted to investing in those funds.

30. If mutual fund investors were less attracted to investment in Janus Funds, they would shift their money into other investments. This decrease in funds under management at Janus would have a direct impact on Janus' bottom line and affect the profitability and attractiveness of Janus Capital's common stock, given the fact that such a large portion of Janus Capital's revenues come from fees that are based on the amount of funds under management in the Janus Funds.

31. It is for this reason, among others, that Janus wrote and represented its policy against market timers, recognizing the additional costs and other adverse effects that market timing and other short-term trading places on mutual funds.

32. Mutual fund managers are well aware of the damaging effect that timers have on their funds. One study estimated that U.S. mutual funds lose $4 billion per year to timers. Eric Zitzewitz, Who Cares About Shareholders? Arbitrage-Proofing Mutual Funds (October 2002) 35, http://faculty-gsb.stanford.edu/zitzewitz/Research/arbitrage1002.pdf. While it is virtually impossible for fund managers to identify every timing trade, large movements in and out of funds are apparent. Moreover, mutual fund managers have several ways of fighting back against timers.

33. Mutual fund managers generally have the power simply to reject timers' purchases. Many funds have also instituted short-term trading fees ("early redemption fees") that effectively wipe out the arbitrage profits that timers exploit, thereby removing the incentive to engage in the market timing trades. Typically, these fees go directly into the affected fund to reimburse it for the costs of short term trading. In addition, fund managers are required to update NAVs at the end of the day in New York when there have been market moves that might render the NAV stale. This is called giving the fund a "fair value," and eliminates the timers' arbitrage. As fiduciaries for their investors, mutual fund managers are obligated to use their best efforts to employ these available tools to protect their customers from the dilution that timing causes.

34. Notwithstanding the clear harm that timing causes, and fund managers' relatively easy ability to prevent large-scale timing, fund managers nonetheless sometimes succumb to incentives to allow their funds to be timed. Typically a single management company sets up a number of mutual

funds to form a family. Janus Management is the manager for the Janus family of funds. While each mutual fund is in fact its own company, as a practical matter the management company runs it. The portfolio managers who make the investment decisions for the funds and the executives to whom they report are all typically employees of the same management company, not the mutual funds themselves. Still, the management company owes fiduciary duties to each fund and each investor in addition to investors of the management company's own securities.

35. The management company makes its profit from fees it charges the funds for financial advice and other services. Such fees are typically a percentage of the assets in the fund, so the more assets in the family of funds, the more money the manager makes. Knowing this, the timer frequently offers the manager more assets in exchange for the right to time.

36. As an investment advisor selling its own funds, Janus was required to provide to all prospective mutual fund customers a copy of the mutual fund prospectus. The prospectus must contain all information that a prospective investor would find relevant in making an educated decision to purchase shares of the mutual fund.

37. Janus' prospectuses did not disclose that certain mutual fund customers were allowed to engage in market timing activity or short-term trading.

MATERIALLY FALSE AND MISLEADING STATEMENTS MADE DURING THE CLASS PERIOD

38. Janus fund prospectuses were filed with the Securities and Exchange Commission and are publicly available from a variety of sources. Janus Capital makes the most recent prospectus for each Janus Fund available on its website, www.janus.com. These prospectuses, which are given to prospective shareholders, included language that said Janus' funds were "not intended for market timing or excessive trading" and said "Janus had measures in place to stop the trading." These statements were materially false and misleading. As New York's Attorney General revealed in September 2003, following a lengthy investigation, and as Janus subsequently admitted, Janus and its subsidiaries had, for years, entered into secret arrangements to allow several hedge funds to engage in market timing transactions in various Janus Funds.

39. The misrepresentations (some of which are detailed immediately below) attracted and retained investments in the Janus Funds and increased Janus Capital's revenues, thereby artificially inflating Janus Capital's stock price. Had the truth been known, Janus Funds would have been less attractive to investors, and consequently, Janus Capital would have realized lower revenues, so Janus Capital's stock would have traded at lower prices.

40. The "Excessive Trading Policy" in the February 28, 2003 prospectus for the Janus Mercury Fund (one of the funds in which Janus later admitted to allowing market timing) states:

> Frequent trades in your account or accounts controlled by you can disrupt portfolio

> investment strategies and increase Fund expenses for all Fund shareholders. The fund is not intended for market timing or excessive trading. To deter these activities, the Fund or its agent may temporarily or permanently suspend or terminate exchange privileges of any investor who makes more than four exchanges out of the Fund in a calendar year and bar future purchases into the Fund by such investor. In addition, the Fund or its agent also may reject any purchase orders (including exchange purchases) by any investor or group of investors indefinitely for any reason, including, in particular, purchase orders that they believe are attributable to market timers or are otherwise excessive or potentially disruptive to the Fund.
>
> Orders placed by an investor in violation of the exchange limits or the excessive trading policies or by investors that the Fund believes are market timers may be revoked or cancelled by the Fund . . .

Virtually identical language was contained in prospectuses for other Janus Funds (*see*, *infra*, ¶¶ 41, 43, 45, 49, 51), and similar language was contained in prospectuses for numerous other mutual funds. Nevertheless, as described further below, hedge funds were allowed to time Janus Funds subject to such a prospectus.

41. The Janus High-Yield Fund is a $940 million fund which has been in existence since December 29, 1995. Janus Management is also the investment advisor for, and manager of, the Janus High-Yield Fund. The February 28, 2003 Prospectus

for the Janus High-Yield Fund ("Janus High-Yield Fund Prospectus") states that it is "designed for *long-term investors* who primarily seek current income" (emphasis added). As of September 4, 2003, the Janus High-Yield Fund had a five-year return of 3.85%; three-year return of 4.99%; one-year return of 11.02%; and a return of 8.37% since its inception in December 1995.

42. The Janus Mercury Fund Prospectus states, with respect to the fund-related fees and expenses an investor may expect to bear along with other shareholders, as follows:

> **Shareholder fees,** such as sales loads, redemption fees or exchange fees, are charged directly to an investor's account. The Fund is a no-lead investment, so you will generally not pay any shareholder fees when you buy or sell shares of the Fund.
>
> **Annual fund operating expenses** are paid out of the Fund's assets and include fees for portfolio management, maintenance of shareholder accounts, shareholder servicing, accounting and other services. You do not pay these fees directly but . . . these costs are borne indirectly by all shareholders.

43. The same language is contained, virtually verbatim, in the February 28, 2003 Janus High-Yield Fund Prospectus, with the added provisions, with respect to shareholder fees, that "if you sell shares of Janus High-Yield Fund that you have held for 3 months or less you may pay a redemption fee."

44. With respect to their policy on the Fund's cash position and use of cash, defendants stated in the Janus Mercury Fund Prospectus, that:

> When the Fund's portfolio manager believes that market conditions are unfavorable for profitable investing, or when he is otherwise unable to locate attractive investment opportunities, the Fund's cash or similar investments may increase. In other words, the Fund does not always stay fully invested in stocks and bonds. Cash or similar investments generally are a residual – they represent the assets that remain after the portfolio manager has committed available assets to desirable investment opportunities. However, the portfolio manager may also temporarily increase the Fund's cash position to, for example, protect its assets, maintain liquidity or meet unusually large redemptions.

45. Again, virtually the identical provision was contained in the February 28, 2003 Janus High-Yield Fund Prospectus:

> When a Fixed-Income Fund's [defined to include the Janus High-Yield Fund] portfolio manager believes that market conditions are unfavorable for profitable investing, or when he or she is otherwise unable to locate attractive investment opportunities, the Fund's cash or similar investments may increase. In other words, the Fixed-Income Funds do not always stay fully invested in bonds. Cash or similar investments generally are a residual – they represent the assets that remain after a portfolio manager has committed available assets to desirable investment opportunities. However, a portfolio manager may also temporarily

> increase a Fund's cash position to, for example, protect its assets, maintain liquidity or meet unusually large redemptions.

46. The Janus Mercury Fund Prospectus also stated, with respect to "Illiquid Investments," that "[t]he Fund may invest up to 15% of its net assets in illiquid investments," and, with respect to "Foreign Securities, that "the Fund may invest without limit in foreign equity and debt securities," and "may invest directly in foreign securities denominated in a foreign currency and not publicly traded in the United States." Once more, the identical provisions were contained in the February 28, 2003 Janus High-Yield Fund Prospectus.

47. Under the heading, "Pricing of Fund Shares," the Janus Mercury Fund Prospectus stated:

> All purchases, sales and exchanges will be processed at the NAV next calculated after your request is received and accepted by the Fund (or the Fund's agent). The Fund's NAV is calculated at the close of the regular trading session of the NYSE (normally 4:00 p.m. New York time) each day that the NYSE is open. In order to receive a day's price, your order must be received by the close of the regular trading session of the NYSE. Securities are valued at market value or, if a market quotation is not readily available, or if events or circumstances that may affect the value of portfolio securities are identified between the closing of their principal market and the time the NAV is determined, at their fair value determined in good faith under the procedures established by and under the

> supervision of the Trustees. Short-term instruments maturing within 60 days are valued at amortized cost, which approximates market value.
>
> Because foreign securities markets may operate on days that are not business days in the United States, the value of a Fund's holdings may change on days when you will not be able to purchase or redeem the Fund's shares.

Again, the Janus High-Yield Fund Prospectus contains virtually the identical provision.

48. Specifically addressing improper practices such as "timing," defendants, in the Janus Mercury Fund Prospectus, filed on Form N-1A with the Securities and Exchange Commission on February 25, 2002, underscored that such practices were harmful of the Fund and its shareholders, and assured investors that they prohibited market timing and used their best efforts to detect and prevent it, stating:

> Frequent trades in your account or accounts controlled by you can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders. The Funds are not intended for market timing or excessive trading. To deter these activities, the Funds or their agents may temporarily or permanently suspend or terminate exchange privileges of any investor who makes more than four exchanges out of the Fund in a calendar year and bar future purchases into the Fund by such investor. In addition, the Funds or their agents also may reject any purchase orders (including exchange

purchases) by any investor or group of investors indefinitely for any reason, including, in particular, purchase orders that they believe are attributable to market timers or are otherwise excessive or potentially disruptive to the Fund.

Orders placed by investors in violation of the exchange limits or the excessive trading policies or by investors that the Fund believes are market timers may be revoked or cancelled by a Fund on the next business day after receipt of the order. For transactions placed directly with the Funds, the Funds may consider the trading history of accounts under common ownership or control for the purpose of enforcing these policies. Transactions placed through the same financial intermediary on an omnibus basis may be deemed part of a group for the purpose of this policy and may be rejected in whole or in part by a fund.

Prospectuses for the Janus Enterprise Fund, Janus Mercury Fund, Janus High-Yield Fund, Janus Worldwide Fund, and Janus Overseas Fund contain the exact same language in their prospectuses filed on Form N-1A with the Securities and Exchange Commission on February 25, 2002.

49. The prospectus for the Janus Advisor Worldwide Fund and Janus International Growth Fund contains similar language, filed on Form N-1A with the Securities and Exchange Commission on September 30, 2001:

Frequent trading into and out of a Fund can disrupt portfolio investment strategies and

increase fund expenses for all shareholders, including long-term shareholders who do not generate these costs. The Funds are not intended for market timing or excessive trading. The Funds and their agents reserve the right to reject any purchase request (including exchange purchases if permitted by your financial intermediary) by any investor or group of investors indefinitely if they believe that any combination of trading activity in the account(s) is attributable to market timing or is otherwise excessive or potentially disruptive to the Fund. The Funds may refuse purchase orders (including exchange purchases) for any reason without prior notice, particularly orders that the Fund believes are made on behalf of market timers.

The trading history of accounts under common ownership or control may be considered in enforcing these policies. Transactions placed through the same financial intermediary on an omnibus basis may be deemed part of a group for the purpose of this policy and may be rejected in whole or in part by a Fund. Transactions accepted by your financial intermediary in violation of our excessive trading policy are not deemed accepted by the Fund and may be cancelled or revoked by the Fund on the next business day following receipt by your intermediary.

50. The Janus Mercury Fund Prospectus elsewhere underscored the purported prohibition of market timing by stating, under a separate heading

entitled, "Involuntary Redemptions," that "The Fund reserves the right to close an account if the shareholder is deemed to engage in *activities which are illegal or otherwise believed to be detrimental to the Fund,* ***such as market timing.***" The Janus High-Yield Fund Prospectus contains the identical provision.

51. The following prospectuses of funds in which Janus Capital has since admitted to secretly having permitted market timing contained similar language expressing a prohibition of market timing: Janus Overseas Fund Prospectus dated Jan. 31, 2000; Janus Adviser Worldwide Fund Prospectus dated July 31, 2000; Janus Adviser International Fund Prospectus dated July 31, 2000; Janus Prospectus covering the Janus Advisor Worldwide Fund and Janus Adviser International Fund dated Sept. 30, 2001; Janus Enterprise Fund Prospectuses dated Feb. 2, 2001 and July 31, 2001; Janus Prospectuses covering the Janus Worldwide Fund and Janus Overseas Fund dated Feb. 16, 2001; Janus Mercury Fund Prospectus dated Feb. 16, 2001; Janus Prospectus covering the Janus Enterprise Fund and Janus Mercury Fund dated Feb. 25, 2002; and Janus Prospectus covering the Janus High-Yield Fund dated Feb. 25, 2002.

52. Nonetheless, in direct contradiction of defendants' public statements in the Prospectuses, defendants permitted and actively facilitated such market timing by entering into relationships with certain hedge funds and other large institutional investors to allow them to conduct late trading and/or market timing.

Other Materially False and Misleading Statements (Distorted Financial Results)

53. Janus' secret arrangements with hedge funds not only contravened a publicly-stated policy regarding the Company's management of its funds, a policy that attracted long-term investors to the Janus Funds, but it also falsely increased the value of its assets under management through the parking of "sticky assets" by the hedge funds in exchange for the right to market time the Janus Funds. These misrepresentations fraudulently increased the attractiveness of securities issued by Janus Capital Group by falsely inflating the Company's earnings reports during the Class Period.

54. On July 21, 2000, the Company, then Stilwell Financial, issued a press release announcing its financial results for the second quarter 2000. The Company reported second quarter 2000 net income of $151.7 million, or 64¢ per diluted share compared to $70.9 million, or 30¢ per diluted share in second quarter 1999. For the six months ended June 30, 2000, Stilwell reported net income of $293.7 million, or $1.25 per diluted share, compared to $131.9 million, or 56¢ per diluted share, for the same 1999 period.

55. On August 14, 2000, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

56. On October 26, 2000, the Company issued a press release to announce its financial results for the third quarter of 2000. Therein, the company reported second quarter 2000 net income of $170.1 million or 73¢ per diluted share, compared to $82.7 million, or 36¢ per diluted share, in the third quarter 1999. For

the nine months ended September 30, 2000, Stilwell reported net income of $510.5 million, or $2.23 per diluted share, compared to $214.6 million, or 95¢ per diluted share, for the same period in 1999. Average assets under management in the third quarter were $324.2 billion, a 97% increase from the same period in 1999. Since September 30, 1999, the substantial growth in assets under management resulted in an increase in revenues from $311.2 million to $609.5 million.

57. On November 14, 2000, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

58. On January 30, 2001, the Company announced its financial results for the fourth quarter and year-end 2000. At that time, Stilwell reported net income of $153.2 million, or 66¢ per diluted share, during the fourth quarter 2000 compared with net income of $98.5 million, or 43¢ per diluted share, in the fourth quarter 1999. For the full year 2000, Stilwell's net income was $663.7 million, or $2.90 per diluted share, compared with $313.1 million, for $1.38 per diluted share, for the same period in 1999. Exclusive of certain nonrecurring items during 2000, net income for 2000 totaled $610.8 million, or $2.67 per diluted share. Additionally, the Company reported:

> Fourth Quarter 2000 vs. Fourth Quarter 1999
>
> Stilwell, which includes Janus, Berger LLC, Nelson Money Managers PLC and an approximate 33% equity investment in DST, reported $257.8 billion in assets under management as of December 31, 2000

compared to $257.4 billion as of December 31, 1999. Average assets under management totaled $284.7 billion during fourth quarter 2000 compared to $208.5 billion in prior year's fourth quarter, $324.2 billion in third quarter 2000 and $304.2 billion in second quarter 2000. For the quarter, market depreciation of $57.0 billion and slight net cash outflows (less than $1 billion) resulted an 18% decline in assets under management. This decline in assets under management generally reflected the net effect to the Company of the widely varied fourth quarter 2000 results for the key market indexes (e.g., an approximately 33% decline in the Nasdaq, an 8% decline in the Russell 2000, a 1% increase in the Dow Jones Industrial Average). Shareowner accounts increased by approximately two million compared to December 31, 1999 and totaled approximately 6.3 million as of December 31, 2000.

Operating margins improved in fourth quarter 2000 versus the comparable 1999 period. This improvement is attributable to the 38% increase in revenues, as well as continued success in maintaining an efficient cost structure. Operating expenses of $287.3 million for fourth quarter 2000 exceeded comparable 1999 by $74.5 million, or 35%, but were 9% below third quarter 2000 expenses. The increase in expenses over prior year occurred in the following key categories: i) compensation, primarily related to an increase in the number of employees; ii) third party concession fees resulting from a higher

level of assets under management through these distribution arrangements; iii) depreciation and amortization arising from Janus' infrastructure enhancement efforts over the last two years and deferred commission payments in connection with the growth in the Janus World Funds PLC; and iv) professional services fees associated with ongoing web development and maintenance efforts.

Full Year 2000 vs. Full Year 1999

For the year ended December 31, 2000, net cash inflows of assets totaled $68.4 billion (of which Janus contributed $66.9 billion). This industry-leading total was substantially offset by market depreciation of $68.0 billion. Average assets under management increased $137.7 billion, or 84%, compared to the average for the year ended December 31, 1999, resulting in a more than $1 billion improvement in revenues.

Operating margins improved from 42.8% to 46.1% year to year, mirroring the strong improvement quarter to quarter. Higher operating expenses were evident in the same cost components noted in the quarterly discussion above. Compensation and third party concession costs were approximately 36% of total revenues during the year ended December 31, 2000 compared to approximately 38% in 1999. With numerous infrastructure enhancements completed throughout 1999 and 2000 and a 132% increase in deferred commission payments resulting from the growth of Janus' offshore

> funds, depreciation and amortization grew nearly 130% in 2000 versus 1999. The rapid increase in assets under management during the first half of the year generated significant shareowner activity, thereby requiring substantial temporary employee help, which is recorded as professional services fees. The rate of increase in the remaining operating expenses on a combined basis (approximately 51%) continues to trail the rate of revenue growth, thereby contributing to Stilwell's competitive operating margins.

59. Commenting on these results, Landon H. Rowland, Stilwell's Chairman, President and Chief Executive Officer stated:

> We are pleased to report Stilwell's record quarterly and full year earnings. For the year, Stilwell's revenues, operating income and net income each grew by more than 85% compared to 1999. These results demonstrate the fantastic achievements of our subsidiaries and highlight the ongoing efforts, diligence and dedication of their management teams.
>
> Movements in Stilwell's assets under management during the fourth quarter generally followed the markets, with market depreciation comprising virtually the entire decline in assets during the quarter. While net flows of cash were essentially flat during the fourth quarter, the $68.4 billion in net inflows for the year were best in the mutual fund industry. During 2000, Janus closed five funds – including its flagship Janus Fund – with the objective of ensuring ongoing

> success for existing fund shareowners. These funds totaled nearly 50% of Janus' total assets under management. We are also pleased with the ability of the subsidiaries to develop alternative distribution and service options for shareholders and the contribution of these actions to year-end results.
>
> We believe Stilwell is well-positioned to build on the momentum generated during 1999 and 2000. Each of Stilwell's investments – Janus, Berger, Nelson and DST – continues to develop and promote its brand name and its comparative advantages. During the third and fourth quarters of 2000, as part of Stilwell's $1 billion stock repurchase program, the Company repurchased more than 7 million shares of its common stock through open market transactions. We believe that this investment, much like the investment in our various subsidiaries and affiliates, will prove to be value-enhancing to our existing shareholders. Additionally, we believe the purchase of Janus stock from Tom Bailey will provide an outstanding opportunity to enhance the management incentives at Janus.

60. On March 20, 2001, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

61. On April 23, 2001, the Company issued a press release announcing its financial results for the first quarter 2001. At that time, the Company reported first quarter 2001 net income of $111.4 million or 48¢ per diluted share, compared to $188.7

million, or 84¢ per diluted share in first quarter 2000. Average assets under management in the first quarter were $246.6 billion, a 16% decrease from the same period in 2000.

62. On May 15, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

63. On July 25, 2001, the Company issued a press release announcing its financial results for the second quarter 2001. At that time, the Company reported second quarter 2001 net income of $104.5 million or 46¢ per diluted share, compared to $150.8 million, or 66¢ per diluted share, in second quarter 2000. For the six months ended June 30, 2001, Stilwell reported net income of $216.4 million, or 94¢ per diluted share, compared to $293.7 million, or $1.29 per diluted share for the same 2000 period. Average assets under management in the second quarter were $223.9 billion, a 26% decrease from the same period in 2000.

64. On August 14, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

65. On October 24, 2001, the Company issued a press release announcing its financial results for the third quarter 2001. At that time, the Company reported third quarter 2001 net income of $90.5 million, or 39¢ per diluted share, compared to $170.1 million, or 73¢ per diluted share, in third quarter 2000. For the nine months ended September 30, 2001, Stilwell reported net income of $306.9 million, or $1.33 per diluted share, compared to $463.8

million, or $2.02 per diluted share, for the same period in 2000.

66. On November 14, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

67. On January 30, 2002, the Company announced its financial results for the fourth quarter and year-end 2001. At that time, Stilwell reported net income of $84 million, or 37¢ per diluted share, during the fourth quarter 2001 compared with net income of $147 million, or 64¢ per diluted share, in the fourth quarter 2000. For the full year 2001, Stilwell's net income was $390.9 million, or $1.70 per diluted share, compared with $610.8 million, or $2.67 per diluted share, for the same period in 2000. Additionally, the Company reported:

> Average assets under management totaled $186.3 billion during fourth quarter 2001, compared to $198.0 billion in third quarter 2001 and $284.7 billion in fourth quarter 2000. The lower level of average assets under management in fourth quarter 2001 versus 2000 resulted in a 37 percent decrease in revenues quarter-to-quarter (to $334.1 million from $530.5 million).
>
> During the year ended December 31, 2001, assets under management declined $65.6 billion (from $257.8 billion to $192.2 billion), of which approximately 92 percent was attributable to market depreciation. Average assets under management during the year ended December 31, 2001, totaled $213.5 billion, compared to $301.9 billion in 2000, resulting in a decrease in revenues from

> $2,248.1 million in 2000 to $1,555.7 million in 2001. With lower revenues and the expected margin pressures noted in the fourth-quarter discussion, Stilwell reported a 41 percent decline in ongoing operating income in 2001 versus 2000.

68. Commenting on these results, Landon H. Rowland, Stilwell's Chairman, President and Chief Executive Officer stated:

> The company's impressive EBITDA margins reflect the benefit of Stilwell's $1.5 billion additional investment in Janus during 2001, as well as the strong operating margins achieved at Janus through aggressive cost controls. We believe these margins are a strong indicator of the financial strength and value of our company.
>
> Stilwell reported an ongoing operating margin of 38.9 percent in fourth quarter 2001 and 39.4 percent for full year 2001. The company's ability to maintain these margins is indicative of the variability in the Janus business model and the savings generated from its emphasis on electronic shareowner servicing. Excluding the amortization expense associated with the company's additional investments in Janus during the year, the ongoing operating margin for the three months and year ended December 31, 2001, was 43.6 percent and 41.8 percent, respectively.
>
> As we move into 2002, each of our core organizations provides opportunities to add shareholder value. Janus is poised to regain momentum through efforts to improve

> investment performance, its strategic diversification of distribution channels and quality brand name. Berger, through the acquisitions of Bay Isle and INTECH, has strengthened its franchise and established a well-rounded foundation for growth. Nelson continues its steady growth through development of a multi-tiered savings gateway for employees throughout the United Kingdom. These subsidiaries, together with the consistently strong earnings growth at DST, provide the foundation for Stilwell's future.

69. On March 20, 2002, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

70. On April 25, 2002, the Company issued a press release announcing its financial results for the first quarter 2002. At that time, the Company reported first quarter 2002 net income of $97.2 million, or 42¢ per diluted share, compared to $111.4 million, or 48¢ per diluted share, in first quarter 2001. Average assets under management in the first quarter were $188.8 billion, a 27% decrease from the same period in 2000.

71. On May 15, 2002, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

72. On July 25, 2002, the Company issued a press release announcing its financial results for the second quarter of 2002. At that time, the Company reported second quarter 2002 net income of $73.7 million, or 30¢ per diluted share, compared to $90.4

million, or 39¢ per diluted share, in second quarter 2001. For the six months ended June 30, 2002, Stilwell reported net income of $170.9 million, or 72¢ per diluted share, compared to $201.8 million, or 88¢ per diluted share, for the same 2001 period.

73. On August 14, 2002, the Company filed its quarterly report with the SEC on form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

74. As stated previously, on September 3, 2002, Stilwell announced that it would merge its operations into a unified organization that would market and distribute its investment products globally under the Janus brand name. Additionally, Stilwell stated that Janus would be led by Mark Whitson, who would become Chief Executive Officer on December 31, 2002, the expected date of the merger. An 11-year Janus veteran, Whitson served as president of retail and institutional services. As part of the merger, Janus would be responsible for the strategic direction of Stilwell's investment management subsidiaries. These subsidiaries include Janus Capital Management LLC; Berger Financial Group LLC, which owns Enhanced Investment Technologies LLC ("INTECH") and Bay Isle Financial LLC; and U.K.-based Nelson Money Managers Plc. Collectively, these firms manage approximately $150 billion in assets.

75. On October 30, 2002, the Company issued a press release to announce its financial results for the third quarter of 2002. Therein, the Company reported a net loss of $131.2 million, or (60¢ per diluted share, during third quarter 2002 compared to net income of $26.8 million, or 11¢ per diluted share, in third quarter 2001. For the nine months ended

September 30, 2002, Stilwell's net income was $39.7 million, or 12¢ per diluted share, compared to $228.6 million, or 99¢ per diluted share, for the same 2001 period.

76. On November 14, 2002, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

77. On January 2, 2003, Janus announced that following the merger of Janus Capital Corporation and Stilwell Financial Inc., which became effective on January 1, 2003, shares of the new organization – Janus Capital Group Inc. – began trading on the New York Stock Exchange under the ticker symbol JNS.

78. On January 30, 2003, Janus announced its financial results for the fourth quarter and year-end 2002. At this time, Janus reported net income of $45.0 million, or 18¢ per diluted share, during the fourth quarter 2002 compared with net income of $73.7, or 32¢ per diluted share, in the fourth quarter 2001. For the full year 2002, Janus' net income was $84.7 million, or 31¢ per diluted share, compared with $302.3 million, or $1.31 per diluted share, for the same period in 2001. The Company's 2002 earnings reflect decreased average assets under management as well as the effects of significant non-recurring items reported in the third quarter 2002. Excluding these non-recurring items, net income for 2002 totaled $244.0 million, or $1.02 per diluted share, compared with $390.9 million, or $1.70 per diluted share in 2001. Additionally, the Company reported:

> Fourth Quarter 2002 vs. Fourth Quarter 2001

Janus Capital Group ended the year reporting assets under management of $138 billion, compared with $140 billion as of September 30, 2002 and $193 billion as of December 31, 2001. Assets under management include assets from Janus' investment management subsidiaries: Janus Capital Management LLC; Berger Financial Group LLC, which owns Enhanced Investment Technologies, LLC (INTECH) and Bay Isle Financial LLC; and Nelson Money Managers plc. The total also includes the small- and mid-cap value assets that Perkins, Wolf, McDonnell and Company manages for Berger retail and institutional shareholders. The slight decrease in assets during the quarter reflected market appreciation of $3 billion offset by net redemptions of $5 billion.

Full Year 2002 vs. Full Year 2001

During the year ended December 31, 2002, assets under management decreased $54 billion – from $192 billion to $138 billion. This decline reflected market depreciation of $42 billion, net outflows of $18 billion and increased assets of $6 billion from Berger's acquisition of INTECH. Average assets under management in 2002 declined 23% to $164 billion from $214 billion in 2001. These lower average assets under management led to a 26% decrease in annual revenue – from $1.5 billion to $1.1 billion.

79. Commenting on these results, Whitson stated:

> Today's financial results reflect the challenging environment reflect the challenging environment for growth-orientated investment managers, but I'm confident that we're taking the necessary steps to ensure that Janus is well positioned for future growth[.] . . . Since we merged Janus and Stilwell, we've made remarkable progress in a very short time.
>
> Earlier this month, Janus introduced seven new value funds and risk-managed equity products to complement its growth-orientated lineup.
>
> Broadening our product offerings is an important step toward improving our top-line growth[.] . . . We're also focused on controlling costs to manage our business as efficiently as possible.
>
> Nothing is more important to me than improving performance, and we saw signs last year that the steps we're taking to that end are paying off[.] . . . Our improved relative performance and the results from our more conservative products were bright spots in 2002.
>
> Our focus in 2003 will be to continue improving performance, while leveraging Janus' global distribution network and managing our expenses[.]

80. On March 28, 2003, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

81. On April 29, 2003, Janus announced, via a press release, its financial results for the first quarter of 2003. Therein, Janus reported net income of $38.6 million, or 17¢ per diluted share, during the first quarter 2003 compared with $45.0 million, or 20¢ per diluted share in the preceding quarter, and $97.2 million, or 42¢ per diluted share in the first quarter of 2002. Average assets under management in the first quarter 2003 totaled $136.4 billion, a 23% decline from the same period in 2001. This lower level of average assets under management caused the company's revenues to drop 26%-to $284.3 million-from $334.1 million in the fourth quarter of 2001.

82. On May 15, 2003, the Company filed its quarterly report with the SEC on Form 10-Q. Therein, the Company reaffirmed its previously announced results.

83. On July 30, 2003, Janus issued a press release to announce its financial results for the second quarter of 2003. Therein, Janus reported net income of $47.5 million, or 21¢ per diluted share, on revenues of $250.6 million for the quarter ended June 30, 2003. The fn-m reported net income of $73.7 million, or 33¢ per diluted share, on revenues of $310.4 million in the comparable 2002 quarter. In the first quarter of 2003, net income was $38.6 million, or 17¢ per diluted share, on revenues of $235.5 million. Assets under management at June 30, 2003, totaled $149.8 billion, an increase of $17.1 billion, or 12.9% from the $132.7 billion reported at March 31, 2003, due to $1.6 billion in net inflows combined with $15.5 billion of market appreciation. Of the $1.6 billion in net inflows, $0.2 billion were

long-term assets and $1.4 billion came from money markets.

84. On August 12, 2003, the Company filed its quarterly report with the SEC on Form 10-Q. Therein, the Company reaffirmed its previously announced results.

85. The financial statements referenced above were each materially false and misleading because they failed to disclose and/or misrepresented the following adverse facts, among others: (1) that Janus entered into secret, illegal agreements with several hedge funds wherein Janus permitted the hedge funds to time Janus mutual funds; (2) that in exchange for permitting the hedge funds to time Janus mutual funds, those hedge funds deposited "sticky assets" into certain Janus money market funds; (3) that the "sticky assets" deposited into certain Janus money market funds permitted Janus to materially overstate its assets under management and thus permitted Janus to receive a steady flow of fees from such "sticky assets;" and (4) as a result of this illegal scheme, Janus, throughout the Class Period, materially overstated and artificially inflated Janus' income and earnings per share.

THE TRUTH EMERGES

86. On September 3, 2003, New York Attorney General Eliot Spitzer filed a complaint in New York Supreme Court against a hedge fund manager named Canary Partners. The complaint (the "Spitzer Complaint," the contents of which are incorporated by reference herein) charged Canary and its principals with secretly paying several mutual fund managers (including Janus) to allow Canary to engage in, *inter alia*, market timing trades in those mutual funds. The investigation was triggered by a

call from a former employee at Canary saying that Canary had secret agreements with Janus and other mutual fund managers to market time funds. The Attorney General's office interviewed several people associated with Canary and subpoenaed documents, including internal e-mail communications, from Janus and other mutual fund companies prior to filing its complaint.

87. The Spitzer Complaint alleged, with regard to Janus, as follows, among other things:

> In or about April, 2002, Janus granted permission for Canary to time the Janus Mercury fund. In exchange, Canary deposited "sticky" money into a Janus money market fund. Canary timed the Janus Mercury fund during 2002 and 2003. Canary also received capacity to time the Janus High Yield fund.
>
> In early 2003, Canary sought timing capacity in Janus' offshore funds. Through an intermediary, it contacted Janus and offered "sticky" assets in exchange for this additional timing capacity. (JCG 000277-000278)[1] In response, a concerned Janus employee sent e-

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[1] Citations bearing the prefix "JCG" refer to production numbers of internal documents that Attorney General Spitzer obtained from Janus in the course of his investigation. These documents and Attorney General Spitzer's complaint were made publicly available on the New York Attorney General's website attached to the press release announcing the filing of the complaint. The Attorney General's complaint and the referenced supporting documents are incorporated herein by reference.

mails to Richard Garland, the CEO of Janus International, expressing alarm over the volume of market timing activity in Janus Mutual Funds:

> I'm getting more concerned w/ all of these market timers and how they are affecting our PM's [i.e., Portfolio Managers] trading activity. [Portfolio Managers] have voiced their sensitivity on a number of occasions re: this type of activity in JWF. I spoke to [a Janus employee] and confirmed that this is a big problem domestically and I want to avoid this at all cost before it gets too problematic offshore. Now that we have our exchange limitation in our prospectus, I would feel more comfortable not accepting this type of business because its too difficult to monitor/enforce & it is very disruptive to the PM's & operation of the funds. Obviously, your call from the sales side.

(JCG 000277)

[A] Janus employee also recommended to Garland [then CEO of Janus International] that Janus refuse the additional business from Canary due to the issues created for portfolio managers: "For now, I don't think we should take-on additional business of this nature.... We need to keep our funds clean & minimise [sic] issues for PM's/fund performance. Do you agree?"

Garland did not agree. He replied: "I have no interest in building a business around market timers, but at the same time **I do not want to turn away $10-$20m!** How big is

> the [Canary] deal...?" After learning that Canary's timing could amount to between **$10 and $50 million dollars,** Garland gave the "[g]o ahead" for Canary's additional timing capacity on April 3, 2003.

(Emphasis added).

88. Additionally, the Spitzer complaint alleged, referencing and attaching additional evidence:

> • ***Managing the extensive timing activity in its funds became difficult for Janus.*** In early June, 2003, it began to consider adopting a consistent policy on market timing. Discussion concerning development of such a policy was opened up to certain Janus employees. Comments included:
>
> • ***"Our stated policy is that we do not tolerate timers. As such, we won't actively seek timers, but when pressed and when we believe allowing a limited/controlled amount of timing activity will be in JCG's best interests (increased profitability to the firm) we will make exceptions under these paramaters."*** (JCG 000605)
>
> • "My own personal recommendation is not to allow timing, period, and follow the prospectus.... [T]imers often hide multiple accounts and move on the same day which could hurt other investors and enrage the Pms....I don't think the static assets that we might be able to hold onto are worth the potential headaches, nor does this fall into our 'narrow and deep' focus. ***I suggest we***

> ***maintain the timing agreements we have, but allow no more.*** (JCG 000569-570)
>
> • ***"[I]f we are going to allow timing, we want to be sure that there are enough static assets [i.e., "sticky" assets] so that we are making a decent profit for all the trouble we are put through."*** (JCG 000569)

(Emphasis added).

89. The Company never denied the allegations in the Spitzer Complaint; in fact, following September 3, 2003, Janus admitted to the facts alleged in the Spitzer Complaint and many others that prove the arrangements to allow market timing in contravention of the Company's stated policies were much more widespread than previously imagined.

90. On September 3, 2003, Janus issued a press release to discuss its reaction to the filing of a complaint against the Company, among others. In it, the Company stated:

> Janus Capital Management intends to continue cooperating with the New York Attorney General's inquiry. Janus is reviewing the complaint closely and is committed to ensuring that the company continues to act in the best interest of Janus fund shareholders.

91. On this revelation Janus Capital's shares began the descent that has ultimately wiped out hundreds of millions of dollars of market capitalization. This share price decline, in reaction to disclosure of the truth concerning defendants'

statements and activities, caused injury to plaintiff and members of the class.

92. On September 5, 2003, Janus issued a press release that discussed specific steps the Company planned to take in response to Spitzer's allegations. The company reported in part:

> On Wednesday, Attorney General Spitzer announced that he is investigating trading practices in the mutual fund industry. The investigation was prompted by the Attorney General's settlement with a hedge fund, Canary Capital Partners LLC, which allegedly engaged in irregular trading practices with certain mutual fund companies.
>
> "We've long viewed market timing as an industry wide problem involving both mutual funds and the many intermediaries with whom investors work," Whiston said. "Regardless, we have to do what's right for our fund shareholders. It's our hope that the measures we're announcing today will help resolve this situation in a way that recognizes the importance of the matter. Most of all, we hope this action demonstrates that Janus is committed to living up to the high ethical standards that our shareholders expect of us."

93. On October 29, 2003, Janus issued a press release announcing its financial results for the third quarter of 2003. Therein, the Company reported in part:

> Janus Capital Group Inc. today reported third-quarter net income of $50.9 million, or

> $0.22 per diluted share, on revenues of $256.6 million. The quarterly net income includes a preliminary charge of $9.0 million to account for costs related to the investigation into mutual fund trading.
>
> In the second quarter of 2003, net income totaled $47.5 million, or $0.21 per diluted share, on revenues of $245.5 million. In the third quarter of 2002, the firm reported a net loss of $131.2 million, or $0.59 per diluted share, from revenues of $252.7 million. The loss in the third quarter of 2002 was caused in part by a non-cash deferred income tax charge of $107.8 million and a corporate restructuring charge of $59.4 million.

94. As shocking as the Spitzer Complaint's allegations were, they were the tip of the iceberg. Janus' secret deals, in contravention of its publicly-stated policies, were not limited to the arrangements from 2002 with Canary that were described in the Spitzer complaint. Janus would eventually admit that the secret market timing arrangements covered a much longer time period and involved many more hedge funds.

95. In December 2003, Janus acknowledged that it had special trading arrangements with 10 investors starting November 2001 and continuing to mid-2003. Janus admitted that the market timers made millions of dollars in profits and some of the agreements with Janus involved the waiver of redemption fees (which were meant to discourage market timing).

96. As was reported by Bloomberg and others on December 19, 2003, Janus admitted that 10 unidentified investors were permitted to buy and sell

shares more frequently than was normally allowed. The trading began in November 2001 and occurred as recently as the first half of 2003 with net gains realized by the investors exceeding $20 million.

97. On Monday, November 17, 2003, Janus announced that Richard Garland, Chief Executive of Janus International, had resigned. Garland's name had emerged in the initial investigation in September which included an e-mail that Garland wrote concerning an arrangement to allow Canary Capital Partners to engage in market timing trades in Janus Funds.

98. As was reported by Bloomberg and others on September 30, 2003, Janus admitted that it had earned money from market timing in 7 different funds: Janus Mercury Fund, Janus Worldwide Fund, Janus Enterprise Fund, Janus High-Yield Fund, Janus Overseas Fund, Janus Adviser Worldwide Fund, and the Janus Adviser International Growth Fund.

99. As a result of these admissions, the Company was forced to pay huge sums to settle claims with regulators, restructure senior management and restore investor confidence in the future of Janus.

100. On April 27, 2004, Janus agreed to cut fees by $125 million and pay $101 million in penalties to settle allegations by New York and Colorado regulators.

101. Standard & Poor's reported that Janus experienced $8.1 billion in net redemptions in fourth quarter 2003 and $10.5 billion in net redemptions in the first quarter 2004.

102. As the Wall Street Journal reported on April 27, 2004, the settlement announced that day was more than triple the amount Janus had previously said it would repay to fund shareholders as a result of the market timing and allegations. The Wall Street Journal also reported that "[i]n addition to the monetary penalties, Janus agreed to a requirement that the Chairman of its mutual fund boards be 'truly independent'. Until March of 2004, Janus founder and former Chief Executive, Tom Bailey served in that role."

103. As the Wall Street Journal reported on April 21, 2004, in the wake of the scrutiny, Mr. Whitson stepped down as Chief Executive Officer. His departure followed that of Richard Garland, the head of Janus' international operations, who stepped down in November 2003. Earlier in April 2004, Lars A. Soderberg, head of Janus' institutional business agreed to take a leave of absence.

104. As the New York Law Journal reported on August 19, 2004, Janus agreed to settle charges brought by the Securities and Exchange Commission by paying over $100 million. The S.E.C. "found that Janus made arrangements with 12 entities allowing them to market time several funds managed by the advisory group."

IMPACT OF THE REVELATIONS ON JANUS CAPITAL AND ITS STOCK

105. On April 27, 2004, Janus reported a first quarter net loss of $19.3 million or $0.08 a share. The company took the charge of $59 million or $0.21 a share for civil penalties, restitution, payments and legal charges relating to the allegations of improper market timing trades (Bloomberg 4/28/04).

106. As the Wall Street Journal reported on February 5, 2004, Janus booked a fourth quarter charge of $62.8 million directly related to the admitted market-timing-related misconduct, and warned that further charges may come.

107. As the Wall Street Journal article reported on April 28, 2004:

> For Janus, the settlements pale in comparison to the damage already done by the trading scandal. Janus now oversees $145 billion in assets, down from $320 billion at the peak of the technology stock above early 2000.... In the first 8 months of last year [2003], investors withdrew a net $5.1 billion from Janus funds according to financial research group. Between September [2003] and February [2004], investors yanked out an additional $14 billion.

108. An April 28, 2004 Bloomberg article added that investors took out $7.7 billion from Janus mutual funds in the first quarter of 2004.

109. Bloomberg reported on March 8, 2004 that several institutional clients, including insurers for which Janus serves as a sub-adviser, announced plans to replace Janus as a manager of billions of dollars of assets.

110. It was entirely foreseeable that the Spitzer Complaint allegations and Janus' additional subsequent admissions would cause large numbers of investors to divest from the Janus Funds. After all, the capital of long-term investors had been attracted through a series of public misrepresentations concerning Janus' policies toward market timing. Long term investors were less likely to invest in a

fund that encouraged market timing, and most investors were less likely to invest in a fund that engages in secret contravention of its publicly-stated policies.

111. It was also entirely foreseeable that the revelations concerning the secret market timing arrangements would have material impact on Janus Capital's common stock price. After all, Janus Capital depended on fund investments for revenue, and when the truth concerning Janus became known, fund investments – many of which had been procured through fraudulent misrepresentations – were likely to decline (and, in fact, they did), and Janus was likely to face liability to regulatory agencies and fund investors (which, in fact, it did).

112. Equity market reaction to the news of Janus' misconduct was swift and demonstrates the severity and materiality of the Company's misconduct. Shares of Janus Capital stock fell noticeably throughout September 2003, as the truth concerning Janus' misconduct was revealed to the public. Janus Capital's common stock traded at $17.68 per share on September 2, 2003, just before the allegations of the Spitzer Complaint were revealed publicly. By September 4, it had plunged 12.7% to $15.60. By September 26, it had fallen to $13.50. The average price of Janus common stock for the 90 days following the end of the Class Period was $14.42, which is 19.26%, or $3.44, below Janus' closing price on the last day of the Class Period. This price decline which resulted from revelation of the truth concerning defendants' misrepresentations, omissions and misconduct caused injury to plaintiff and the class members.

ADDITIONAL SCIENTER ALLEGATIONS

113. As alleged herein, defendants acted with scienter in that defendants knew that the public documents and statements issued or disseminated in the name of Janus were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, defendants, by virtue of receipt of information reflecting the true facts regarding Janus, their control over, and/or receipt and/or modification of Janus' allegedly materially misleading misstatements and/or their associations with the Company which made them privy to confidential proprietary information concerning Janus, participated in the fraudulent scheme alleged herein.

114. Defendants knew and/or recklessly disregarded the falsity and misleading nature of the information which they caused to be disseminated to the investing public. The ongoing fraudulent scheme described in this Second Amended Complaint could not have been perpetrated over a substantial period of time, as has occurred, without the knowledge and complicity of the personnel at the highest level of the Company.

115. Fees from the management of mutual funds have constituted in excess of 90% of the Company's revenue and income. At all relevant times Janus' management has taken a primary interest in the way their mutual funds are managed because income from these funds represents almost all of the Company's income. As such, management had a duty

to be involved in decisions regarding or at a minimum aware of agreements entered into by Janus Funds and certain large investors.

116. The Wall Street Journal on April 27, 2004 quoted New York Attorney General Elliot Spitzer as saying, "[t]he behavior here was made more problematic because of the knowledge . . . [which went] up to the very senior levels in the management of the Janus funds."

117. Management's knowledge of the misconduct is evidenced by the emails from Mr. Garland revealed in the Spitzer Complaint. Garland was not some low-level manager. As the Wall Street Journal reported on April 6, 2004, Messrs. Garland and Soderberg (who also resigned in the wake of the scandal) reported directly to Janus Chief Executive, Mark Whitson.

118. Mr. Whitson himself ordered a study of market timing in Janus' funds and received the results of the study in November 2002, according to a Wall Street Journal report published on April 21, 2004. Yet, the market timing trades continued until at least 2003 according to the complaint filed against Canary by Attorney General Elliot Spitzer in September.

119. According to Dow Jones news on March 26, 2004, CBS Market Watch claimed to have obtained an internal Janus memorandum that shows that Mr. Whitson and other Janus senior managers knew about the market timing trades in 2002.

120. In any event, Janus' knowledge of the misconduct occurred through the actions of Mr. Garland and other fund managers who authorized the market timing arrangements. Moreover, it is

reasonable to infer that Janus' senior management knew of the misconduct or, at the very least, was reckless in not knowing, given the undisputable knowledge on the part of Mr. Garland, and others who reported directly to Mr. Whitson, and given the study Mr. Whitson had commissioned, and given the importance of the mutual fund operations to the overall business of defendants Janus Capital and Janus Management.

APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD-ON-THE-MARKET DOCTRINE

121. The market for Janus Capital common stock was open, well-developed and efficient at all relevant times. As a result of these materially false and misleading statements and failures to disclose, Janus' publicly traded securities traded at artificially inflated prices during the Class Period. Plaintiff and other members of the Class purchased or otherwise acquired Janus Capital common stock relying upon the integrity of the market price of those securities and market information relating to Janus, and have been damaged thereby.

122. During the Class Period, defendants materially misled the investing public, thereby inflating the price of Janus Capital common stock, by publicly issuing false and misleading statements and omitting to disclose material facts necessary to make defendants' statements, as set forth herein, not false and misleading. Said statements and omissions were materially false and misleading in that they failed to disclose material adverse information and misrepresented the truth about the Company, its business and operations, as alleged herein.

123. At all relevant times, the material misrepresentations and omissions particularized in this Amended Complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by plaintiff and other members of the Class. As described herein, during the Class Period, defendants made or caused to be made a series of materially false or misleading statements about Janus' business, operations and operating policies, thus causing Janus Capital common stock to be overvalued and artificially inflated at all relevant times. Defendants' materially false and misleading statements during the Class Period resulted in plaintiff and other members of the Class purchasing Janus Capital securities at artificially inflated prices, thus causing the damages complained of herein.

124. At all relevant times, the market for Janus Capital common stock was an efficient market for the following reasons, among others: (a) Janus Capital stock met the requirements for listing, and was listed and actively traded on the NYSE, the largest stock market in the United States, with more than 235 million shares outstanding and average daily trading volume significantly in excess of 1 million shares; (b) as a regulated issuer, Janus Capital filed periodic public reports with the SEC and the NYSE, including S-3 registrations; (c) Janus regularly communicated with public investors via established market communication mechanisms, including through regular disseminations of press releases on the national circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services, and Janus fund prospectuses were publicly available

through, *inter alia*, various online sources; and (d) Janus Capital was followed by securities analysts at several major securities firms, including, *inter alia*, UBS, CIBC World Markets and Morgan Stanley, who wrote reports which were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace.

125. As a result of the foregoing, the market for Janus Capital publicly traded securities promptly digested current information regarding Janus from all publicly available sources and reflected such information in Janus Capital's stock price. Janus Capital's stock price reacted promptly to material information about the Company. Under these circumstances, all purchasers of Janus Capital publicly traded securities during the Class Period suffered similar injury through their purchase of those securities at artificially inflated prices, and a presumption of reliance applies.

FIRST CLAIM

Violation Of Section 10(b) Of The Exchange Act And Rule 10b-5 Promulgated Thereunder Against All Defendants

126. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

127. During the Class Period, defendants carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing public, including plaintiff and other Class members, as alleged herein and (ii) cause plaintiff and other members of the Class to purchase

Janus Capital securities at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, defendants, and each of them, took the actions set forth herein.

128. Defendants (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities in an effort to maintain artificially high market prices for Janus Capital securities in violation of Section 10(b) of the Exchange Act and Rule 10b-5. Both defendants are sued either as primary participants in the wrongful and illegal conduct charged herein or as controlling persons as alleged below.

129. Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business and operations of Janus as specified herein.

130. These defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of Janus' value and performance, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about Janus, its financial performance and its business operations and its

policies concerning market timing in the light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of Janus Capital during the Class Period.

131. The defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing Janus' operating condition, financial performance and true operating policies from the investing public and supporting the artificially inflated price of its securities. As demonstrated by defendants' overstatements and misstatements of the Company's business and operations throughout the Class Period, defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false or misleading.

132. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price of Janus Capital's securities was artificially inflated during the Class Period. In ignorance of the fact that market prices of Janus Capital's publicly-traded securities were artificially

inflated, and relying directly or indirectly on the false and misleading statements made by defendants, or upon the integrity of the market in which the securities trade, and/or on the absence of material adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, plaintiff and the other members of the Class acquired Janus Capital securities during the Class Period at artificially high prices and were damaged when the shares that they still held declined upon public revelation of the true nature of defendants' conduct.

133. At the time of said misrepresentations and omissions, plaintiff and other members of the Class were ignorant of their falsity, and believed them to be true. Had plaintiff and the other members of the Class and the marketplace known the truth regarding Janus' illegal agreements with market timers, which were not disclosed by defendants, plaintiff and other members of the Class would not have purchased or otherwise acquired their Janus Capital securities, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices which they paid.

134. By virtue of the foregoing, defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

135. As a direct and proximate result of defendants' wrongful conduct, plaintiff and the other members of the Class suffered damages in connection with their respective purchases and sales of Janus Capital securities during the Class Period.

SECOND CLAIM

Violation Of Section 20(a) Of The Exchange Act Against Janus Capital

136. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

137. Janus Management is the largest and most important subsidiary of Janus Capital. The operation of Janus Management was ultimately the responsibility of Janus Capital. Janus Capital had the power to control Janus Management and did exercise this power.

138. Furthermore, Helen Hayes was during all or part of the Class Period a director of Janus Capital. Additionally, Ms. Hayes served as Managing Director of Investments and as a portfolio manager at Janus Management. She served in a day-to-day supervisory position at Janus Management and had the power to control its operations.

139. Mark Whitson, before becoming Chief Executive Officer and President of Janus Capital, served as President of Retail and Institutional Services for Janus Management during part of the class period. Prior to the formation of Janus Management he held the same position with Janus Capital Corporation. Moreover, Mr. Whitson commissioned an inquiry into market timing of Janus Funds, the results of which he received in 2002 (*see* ¶ 118, *supra*). Mr. Whitson knew about the misconduct. Acting on behalf of Janus Capital, Mr. Whitson, and through him, Janus Capital, had and exercised the power to control the activities of Janus Management.

140. As set forth above, Janus Management violated Section 10(b) and Rule 10b-5 by its acts and omissions as alleged in this Complaint. By virtue of its position as a controlling person, Janus Capital is liable on account of Janus Management's fraud pursuant to Section 20(a) of the Exchange Act.

PRAYER FOR RELIEF

WHEREFORE, lead plaintiff prays for relief and judgment, as follows:

(a) Determining that this action is a proper class action, designating lead plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure and lead plaintiff s counsel as Class Counsel;

(b) Awarding compensatory damages in favor of lead plaintiff and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

(c) Awarding plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

(d) Such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: June 2, 2006

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APPENDIX F

1. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

2. Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 2 - 2009
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No. 09-525

In The
Supreme Court of the United States

JANUS CAPITAL GROUP, INC., *et al.*,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petition addresses the liability, under section 10(b) of the Securities Exchange Act of 1934, of a mutual fund administrator/investment advisor for misleading statements in mutual fund prospectuses where, consistent with mutual fund industry practice, and as stated in the prospectuses, all fund operations were handled by the administrator, the administrator was involved in preparing and reviewing the prospectuses in question, the administrator filed the prospectuses with the SEC and disseminated them as well, and the misrepresentations at issue herein were statements that described actions purportedly taken by the administrator. The Fourth Circuit, reversing the district court, held that an investor had pled a securities fraud claim against the administrator in the above-described situation.

The questions presented here are:

1. Did the Fourth Circuit err in holding that the investor pled that the administrator, having played a role in drafting the prospectuses, and having disseminated and filed the prospectuses with the SEC, "made" the statements therein?

2. Did the aforementioned holding conflict with rulings by the Fifth, Sixth and Eighth Circuits, even though those rulings involved defendants that did not assist in preparing the allegedly misleading statements?

3. Did the Fourth Circuit err in holding that the investor sufficiently pled investors' reliance on the conduct and statements of the administrator under the foregoing circumstances sufficient to comply with this Court's directives in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), in light of (a) the prospectus representations concerning the administrator's role and (b) standard custom in the mutual fund industry?

4. Did the aforementioned holding conflict with rulings of the Second, Tenth and Eleventh Circuits that (a) pre-date *Stoneridge*, and (b) were in any event expressly harmonized by the Fourth Circuit in its opinion?

5. Does the Fourth Circuit open the door to 10(b) liability on the part of a wide array of peripheral "service providers" to issuers of securities, even though the investors must also establish the administrators' scienter as a predicate to recovery, the misrepresentations concerned the administrator's own conduct, and the Fourth Circuit ruling was expressly predicated on (a) the administrator's role in making and disseminating the statements and (b) the communication of that role to the public?

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INTRODUCTION

Petitioner-defendants incorrectly contend that the Fourth Circuit ruling evidenced a conflict among the circuits. Nothing in the circuit court opinions to which petitioners cite suggests that one does not "make" a statement by participating in its preparation, filing and dissemination. In fact, the Fourth Circuit expressly provided a detailed explanation of how its ruling is consistent with other circuits' requirements. App. 19a-27a.[1]

Subsequent to the rulings to which petitioners cite as evidence of a conflict, this Court, in *Stoneridge* addressed the standards for 10(b) primary liability. This Court made it clear that liability can exist absent statements that are directly attributed to the defendant, as "conduct itself can be deceptive" and therefore it would be "erroneous" "to suggest that there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5." 555 U.S. at 158.

The Fourth Circuit's ruling was in accord with *Stoneridge*. Respondent-plaintiff was found to have stated a claim against petitioner Janus Capital Management LLC ("JCM"), a mutual fund administrator, because statements in the allegedly misleading mutual fund prospectuses which JCM filed and disseminated and helped to prepare, gave investors reason to believe that the statements were the work of JCM, as did mutual fund industry custom. *See* App. 27a-30a.

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[1] References to "App. ___" are to the appendix attached to the Petition. References to "C.A. App. ___" are to the Joint Appendix filed by the parties on appeal to the Fourth Circuit.

Petitioners also overstate the ramifications of the Fourth Circuit's holding.

Petitioners speak of the chilling impact that this ruling would have upon service providers or professionals who might now face new potential liability for documents that they assist in preparing on behalf of issuers. *See* Pet. 20-22. In fact, the ruling here turned on facts that were unique to the case at bar, or at the very least, have no application to the liability of an independent service provider or professional that assists in preparing a company's SEC filings.

Petitioner JCM was not a mere "service provider." As is often the case with mutual funds, JCM handled all of the Funds' operations, including preparation, filing and dissemination of the Fund prospectuses and prospectuses statements. App. 64a-65a, ¶ 18. The Funds, whose officers were all JCM executives (C.A. App. 143-44), did not perform any operations of their own. *In re Mutual Fund Inv. Litig.*, 384 F. Supp. 2d 845, 853 n.3 (D. Md. 2005). Therefore, investors had every reason to expect that Fund prospectus statements were the handiwork of JCM.

A ruling of liability on the part of JCM here for its preparation, filing, and dissemination of documents that were known to be misleading in their descriptions of JCM's conduct has no impact on accountants, underwriters, or other professionals who provide services for viable issuers and do not control all operations of the issuer.

And, of course, no liability exists in any event for defendants that act innocently, or with something less than the requisite degree of scienter.

STATEMENT OF THE CASE

This is a proposed class action on behalf of all purchasers of the common stock of petitioner Janus Capital Group Inc. ("JCG") during the period between July 21, 2000 and September 2, 2003 (the "class period"). Claims were asserted against JCG and its wholly-owned subsidiary, petitioner JCM, for violation of section 10(b) of the Securities & Exchange Act of 1934.

A. The Conduct at Issue

JCM and its predecessors served as investment advisor and administrator of the Janus mutual funds (the "Funds"). The fees that JCM obtains from these activities comprise the vast majority of JCG's revenues. Thus, the success of JCM's Fund operations are of vital importance to JCG and its shareholders.

Shares in the Janus Funds were sold through prospectuses. The prospectuses expressly stated that JCM was charged with control over the "day-to-day management" of the "business affairs" of the Janus Funds as well as their "administrative" and "compliance services" (Janus Mercury Fund 2/25/02 Prospectus at 20). C.A. App. 444. The Funds themselves had no operations of their own. *In re Mutual Funds*, 384 F. Supp. 2d at 852 n.3.[2] JCM's

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[2] *In re Mutual Funds*, is one of several other proceedings brought against, inter alia, petitioners, as a result of certain alleged conduct that also gives rise to the claims herein. By order of the Judicial Panel on Multidistrict Litigation, proceedings in this action were coordinated with, inter alia, *In re Mutual Funds*, and the same district judge presided.

functions included preparation of the prospectuses, *In re Mutual Funds*, 590 F. Supp. 2d 741, 747 (D. Md. 2008), filing the prospectuses with the SEC C.A. App. 484 ¶¶ 21, 26, and disseminating the prospectuses to potential investors. *Id.* at ¶ 21. Furthermore, every one of the Janus Fund trust's 17 officers was a JCM Vice President during the relevant time period. C.A. App. 376-77 (Janus Equity and Income Funds Statement of Additional Information at 62-65).

During the class period, the prospectuses represented that steps were taken to prevent traders from engaging in "market timing" transactions in the Janus Funds because those "Funds are not intended for market timing or excessive trading" and market timing was harmful to the Funds' intended customers (long-term investors) because market timers could "disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders" (*Ibid.*). The prospectus detailed numerous measures that were employed to deter market timing in the Funds. App. 72a-80a, ¶¶ 40-52.[3]

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[3] In the words of the Fourth Circuit, "[m]arket timing, as it occurred here, refers to the practice of rapidly trading in and out of a mutual fund to take advantage of inefficiencies in the way the fund values its shares. Some funds, including the Janus funds, use stale prices to calculate the value of the securities held in the fund's portfolio (net asset values (NAVs)), which may not reflect the fair value of the securities as of the time the NAV is calculated. The use of stale prices to calculate the NAV makes a fund vulnerable to time zone arbitrage and other similar strategies; repeated use of such strategies is referred to as 'timing' the fund." App. 5a-6a. Such conduct harms long-term fund holders, whose profit potential is diluted and whose transaction costs are increased.

In fact, in many instances, petitioners secretly and knowingly allowed such transactions. This conduct was revealed publicly on September 3, 2003 when the New York Attorney General ("AG") filed a complaint against a hedge fund engaged in market timing in the Janus Funds. The AG's complaint quoted from internal Janus emails demonstrating knowledge and outright support by JCM and JCG officials of the market timing activity in the Janus Funds. App. 97a-100a, ¶¶ 87-88.

JCG and JCM later admitted to having had secret agreements with twelve (12) different market-timers that allowed hundreds of market-timing trades worth billions of dollars (C.A. App. 483, ¶ 15; *see also* App. 102a-104a, ¶¶ 95-104).[4]

In response to the disclosure of Fund operations that were contrary to public representations, JCG's stock price declined materially.

B. The Rulings Below

1. The District Court

On May 21, 2007, the district court dismissed the action because it found that respondent failed to plead that JCG "ma[d]e material misstatements." App. 49a. The district court did not decide whether or

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[4] Petitioners ultimately agreed to pay $101 million in penalties and to cut fees by $125 million in order to settle allegations brought by the New York and Colorado attorneys general, App. 103, ¶ 101, and over $100 million to settle charges brought by the SEC, App. 104, ¶ 104. The market timing scandal also led to the resignations of several of petitioners' senior executives. App. 103a-104a, ¶¶ 97, 103.

not JCM "made" the prospectus statements, but it dismissed the claims against JCM, because it held that JCM had no "duty" to shareholders of JCG. App. 50a n.5.

2. The Fourth Circuit

Respondent appealed the May 21, 2007 order, and the Fourth Circuit reversed and remanded, holding, inter alia, that respondent alleged conduct by JCM that was sufficient for liability to attach under § 10(b). *In re Mut. Funds Inv. Litig.*, 566 F.3d 111 (4th Cir. 2009). App. 31a.[5]

In reaching its decision, the Fourth Circuit applied a two-part inquiry to determine whether claims had been pled against petitioners. Did the complaint plead (1) that petitioners "made" the challenged statements, and if so, (2) that the statements in the prospectuses were sufficiently publicly-attributable to petitioners to hold them responsible? App. 17a.

The Fourth Circuit held that respondent had pled that JCM had "made" the prospectus statements by participating in the drafting and dissemination of the prospectuses. App. 18a.[6]

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[5] Petitioners moved for a rehearing en banc before the Fourth Circuit, and were denied.

[6] As set forth below, additional findings and evidence in SEC proceedings and in related proceedings in the district court further establish JCM's role in preparing the prospectuses (*see, infra*, at Sec. C).

The aforementioned conclusion brought the Fourth Circuit to the second prong of the inquiry, namely whether either JCM or JCG "ma[d]e a misrepresentation that is public and is attributable to th[at] defendant." *Id.*

The Fourth Circuit, after discussing *Stoneridge*, as well as several pre-*Stoneridge* circuit court holdings on the issue, determined that some degree of "public attribution" is required in order to establish the investors' reliance on a defendant's conduct. App. 23a.

Specifically, the Fourth Circuit held that "for the public attribution element of the reliance inquiry we hold that a plaintiff seeking to rely on the fraud on the market presumption must ultimately prove interested investors (and therefore the market at large) would attribute the alleged misleading statement to the defendant." *Id.*

The Fourth Circuit held that respondent had pled that investors relied on JCM's role in making the prospectus statements because "JCM, in its role as investment advisor to the Funds, 'is responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds,'" and "the portfolio managers who make the investment decisions for the funds and the executives to whom they report are all typically employees of the same management company, not the mutual funds themselves." App. 27a. Furthermore, "the district court [had] observed previously in a related action that [the funds themselves were] merely trusts that hold assets belonging to the shareholders of the funds" and "the defendants in that litigation asserted that [the Funds themselves] have no assets separate and apart from

those they hold for shareholders." App. 29a (quoting and citing *In re Mut. Funds*, 384 F. Supp. 2d at 853, n.3).[7]

The Fourth Circuit noted that the relationship between JCM and the Funds is typical of mutual fund structures, where generally "a mutual fund does not operate on its own or employ a full time staff". *See* App. 29a.

In light of the foregoing, the Fourth Circuit concluded that investors would have reasonably relied on the fact that JCM prepared the prospectuses for the Funds.[8]

C. Facts Established in Other Proceedings

The market timing transactions that were first revealed in the AG action and that gave rise to this action, also gave rise to numerous additional litigation, including proceedings by the Securities & Exchange Commission ("SEC") and related private shareholder derivative and securities fraud actions by, inter alia, investors and shareholders in the various Janus

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[7] In fact, often a single prospectus document would be filed by JCM on behalf of more than a dozen different Janus Funds. Ct. App. 393. Surely, the public understood that such documents were prepared by JCM (which ran the operations for all of the affected funds) rather than the Funds themselves.

[8] The Fourth Circuit also ruled that respondent had not pled facts sufficient to have made it apparent to the investing public that JCG also played a role in drafting the prospectuses. Therefore, the Fourth Circuit affirmed dismissal of the 10(b) claims against JCG (App. 32a), but held that respondent had sufficiently pled a claim under section 20(a) of the Exchange Act against JCG as a "control person" of JCM. App. 40a.

Funds. Proceedings in those parallel actions against, inter alia, JCG, JCM and several of their officers provide further evidence of (a) the role played by JCG and JCM in drafting the prospectus statements at issue and (b) JCM's general control of the Funds' operations.

A 2004 SEC cease and desist order against JCM states that "JCM *filed* several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds" and "willfully . . . made an untrue statement of material fact in a . . . document filed or transmitted pursuant to the Investment Company Act." C.A. App. 484, ¶ 26. (emphasis added).

On April 28, 2008, an Administrative Law Judge (ALJ) issued an Initial Decision in connection with the SEC's enforcement proceedings against three employees of JCM. *In re Lammert*, Rel. No. 348, Admin Proc. File No. 3-12386 (the "Initial Decision").[9] The Initial Decision, in its findings of fact, states that it was the legal department of Janus (defined on page 1 of the Initial Decision as JCM) that "had the responsibility for drafting the prospectuses" for the Janus Funds, and those prospectuses "were approved by the Board [of JCM]." (Initial Decision at 15; *see also*, *id.* at 21, 27). On May 29, 2008 the SEC published notice that the Initial Decision had become final.[10]

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[9] The Initial Decision is available on the SEC's website at http://www.sec.gov/litigation/aljdec/2008/id348cff.pdf.

[10] The Notice That Initial Decision Has Become Final, Rel. No. 8921, Admin. Proc. File No. 3-12386, is available on the SEC's website at http://www.sec.gov/litigation/aljdec/2008/33-8921.pdf.

The district court observed in a suit filed by Janus Fund investors, that the Janus Funds themselves "do not conduct any operating or investment activity on their own." *In re Mut. Funds*, 384 F. Supp. 2d at 853 n.3.[11]

Two summary judgment decisions by the district court in the aforementioned action contain findings that further confirm JCM's role in drafting the prospectuses. Citing to copious deposition testimony, the district court found "ample evidence of substantial involvement by employees of the Janus . . . investment advisers [JCM], including members of their legal department, in the drafting and review of fund prospectuses." *In re Mutual Funds*, 590 F. Supp. 2d at 747. Indeed, petitioners "admit that 'it is undisputed that the Janus legal department drafted and edited certain prospectus language, which was then circulated among JCM and JCG employees for review.'" *Id.*

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[11] For that reason, the district court found (in the companion *In re Mutual Funds* case) that the Funds themselves had no liability for the prospectus misrepresentations, while JCM and JCG had liability. 384 F. Supp. 2d at 872. Thus, absolving JCM would allow for commission of the perfect crime by entities that shared the same officers. Even if the prospectuses were knowingly false or misleading, there would be no liability. The administrator escapes liability for knowing fraud because it prepared, filed and disseminated documents that were issued in the name of the Funds. However, the Funds themselves escape liability, because they played no role in the fraud.

REASONS FOR DENYING THE PETITION

A. There Is No Inter-circuit Conflict, and the Fourth Circuit's Ruling Is Consistent with *Stoneridge*.

Petitioners purport to identify two aspects of the Fourth Circuit's ruling that conflict with other circuits.

First, petitioners argue that the Fourth Circuit's determination that JCM "made" the statements (when it prepared, reviewed, filed and disseminated the prospectuses) puts the Fourth Circuit in conflict with the Fifth, Sixth and Eighth Circuits. Pet. at 10-14.

Second, petitioners argue that the Fourth Circuit's ruling that respondent satisfied the public attribution element of the reliance inquiry brings the Fourth Circuit (along with the Ninth Circuit) in conflict with in the Second, Tenth and Eleventh Circuits, which require that the statement be directly attributed to defendant on its face. Pet. at 14-19.

Petitioners are wrong on both counts. The Fourth Circuit's ruling here did not conflict with others. In fact, the Fourth Circuit expressly harmonized its position on the public attribution issue with the Second, Tenth, and Eleventh Circuits App. 20a-23a. More importantly, the Fourth Circuit's ruling was consistent with this Court's opinion in *Stoneridge* – an opinion that post-dates the allegedly conflicting circuit opinions.

1. The Fourth Circuit's Holding That Respondent Pled That JCM "Made" a Statement Did Not Conflict With the Fifth, Sixth or Eighth Circuits.

The Fourth Circuit did not create a circuit split when it concluded that respondent pled JCM's primary liability for statements that JCM participated in drafting and then filed with the SEC and disseminated publicly. Nothing in pre-*Stoneridge* authorities that petitioners rely upon suggests a contrary result. Nor for that matter does *Stoneridge*.

An examination of the opinions at issue from the Fifth, Sixth and Eighth Circuits confirms the absence of a conflict.

In re Charter Commc'ns, Inc., Sec. Litig., 443 F.3d 987 (8th Cir. 2006) *aff'd and remanded sub nom. Stoneridge*, is the ruling that this Court reviewed in *Stoneridge*. Section 10(b) claims were asserted by investors in the stock of Charter, a cable television operator that inflated its revenues by entering into sham "round trip" transactions with several suppliers. The suppliers inflated the cost of supplies billed to Charter, and at the same time agreed to purchase advertising time from Charter at a higher than fair value rate. Dismissal was affirmed on grounds that are clearly inapplicable to the case at bar. Notably, in *Charter*, "[p]laintiffs did not allege that [defendants] played any role in preparing or disseminating the fraudulent financial statements and press releases through which Charter published its deception to analysts and investors." *Id.* at 990. Elsewhere, the Eighth circuit confirmed "[n]one of the alleged

financial misrepresentations by Charter was made by or even with the approval of the [defendants]." *Id.* at 992.

Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007) *cert. denied*, was an appeal from an order granting class certification. The underlying fact pattern was similar to Charter. Investors in a corporation's securities (in this case Enron) sued various investment banks that entered into transactions with Enron that "allowed Enron to misstate its financial condition." *Id.* at 377.[12] There was "no allegation that the [defendant] banks ... improperly filed financial reports on Enron's behalf." *Id.* Nor was there any allegation that the defendant banks had overlapping management with Enron; were charged with carrying out all of Enron's operations or that the banks participated in drafting the false Enron financial statements, or disseminated them publicly.[13]

Fidel v. Farley, 392 F.3d 220, 235 (6th Cir. 2004) involved 10(b) claims by purchasers of Fruit of the Loom stock against that company's auditor, Ernst & Young, for unaudited financial statements included in Fruit of the Loom's offering documents. The offering documents expressly labeled the financial statements

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[12] Indeed, the *Regents* court noted that *Charter* involved "facts extraordinarily similar to the facts that are present here." *Id.* at 388.

[13] The court in *Regents* even noted that while this Court in *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) had "conclusively foreclosed the application of secondary liability under section 10(b), it stated that some secondary actors, such as investment banks and accountants, can be liable as primary violators in some circumstances." *Regents*, 482 F.3d at 386.

as "unaudited". More importantly, the court's holding was expressly predicated on the fact that "Ernst & Young did not assist in the preparation and presentation of this financial information, nor did it ever express an opinion about it. It therefore cannot be held liable for making a false statement...." *Id.*

The Fourth Circuit's ruling is also consistent with this Court's subsequent *Stoneridge* ruling. This Court did not hold that filing, disseminating, reviewing, and assisting in drafting a misleading statement constitute mere aiding and abetting. Rather, in affirming the *Charter* dismissal, this Court noted that the supplier played no role in preparing or disseminating Charter's financial statements, and in its own financial statements, the supplier booked the transactions in accordance with GAAP. *See Stoneridge*, 552 U.S. at 155-56. Moreover, "nothing [suppliers] did made it necessary or inevitable for Charter to record the transaction as it did." *Id.* at 161.

2. The Fourth Circuit Did Not "Exacerbate" a Split Among Circuits Prior to *Stoneridge* by Holding That Direct Attribution Is Not Required.

Petitioners incorrectly contend that the Fourth Circuit injected itself into an existing split between the Ninth Circuit, on one hand, and the Second, Tenth, and Eleventh Circuits on the other hand, when it held that direct attribution of the statements to JCM is not needed for 10(b) liability, if the parties' actions and

statements had given investors a reason to rely on JCM's conduct in connection with the misrepresentations. *See* Pet. at 14-19.

In fact, the Fourth Circuit expressly harmonized its ruling with the opinions of the circuits with which petitioners claim that it conflicts with regards to the "public attribution" requirement. *See* App. 17a-22a. The Fourth Circuit's opinion is also consistent with *Stoneridge*, which post-dates all of the non-*dicta* authority upon which petitioners rely in their effort to create a conflict.

Far from requiring direct attribution as a predicate for liability, this Court noted in *Stoneridge* that no statements are necessary, so long as the defendants' actions are a necessary part of the fraud, and investors relied on defendants' conduct.

Specifically, this Court noted that it would be "erroneous" if one were "to suggest there must be a specific, oral or written statement before there could be liability under section 10(b) or rule 10b-5." 552 U.S. at 158. The Court confirmed that "conduct itself can be deceptive." *Id.*

This Court's opinion in *Stoneridge* affirming dismissal of claims against Charter's supplier was predicated largely on an analysis of whether or not investors in Charter securities relied in any way on any actions taken by suppliers. Because the defendants in *Stoneridge* played no role in preparing or disseminating Charter's financial statements, 552 U.S. at 155, "[n]o member of the investing public had knowledge, either actual or presumed of respondents' deceptive acts...." *Id.* at 159. Thus, the

Court concluded "[p]etitioner as a result cannot show reliance upon any of respondents' actions, except in an indirect chain...far too remote for liability." *Id.*

The Fourth Circuit's holding was clearly consistent with *Stoneridge*. The Fourth Circuit noted that "[w]hile *Stoneridge* makes clear that the fraud-on-the-market presumption does not apply to transactions that are not publicly disclosed, the holding in *Stoneridge* has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." App. 32a.

Unlike the respondent in *Stoneridge*, JCM admittedly played a major "role in preparing or disseminating" the Janus Fund prospectuses. *In re Mut. Funds*, 590 F. Supp. 2d at 747; 27a-30a; 64a-65a ¶ 18; C.A. App. 109, 366, 371; Initial Decision at 15.

Furthermore, investors here had every basis to believe that the statements came from JCM, because the Funds have no operations of their own, the prospectuses, which were filed and disseminated by JCM expressly stated that JCM was to handle all operations for the Funds. App. 27a-28a. As the Fourth Circuit noted, this arrangement is typical of the mutual fund industry See App. 29a-30a.

In *Stoneridge*, the Court made it clear that direct attribution is not necessary in order to establish investors' reliance on the actions of a participant in the preparation of the misleading statements. Insofar as pre-*Stoneridge* circuit court opinions required

otherwise, they were inconsistent with *Stoneridge*. However, as the Fourth Circuit noted, even those pre-*Stoneridge* circuit courts that have required public attribution appear to allow for liability when investors are given reason to rely on the conduct of unattributed maker of misleading statements. *See* App. 20a-22a, (discussing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001); and *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996)).

In *Wright* (much like in *Fidel, supra*), investors sued a company's auditor for failing to correct inaccurate financial statements for that company that were expressly presented as being "unaudited." Dismissal was affirmed, because the auditor neither directly nor indirectly communicated the misrepresentations to investors. *See* 152 F.3d at 175. As the Fourth Circuit noted "*Wright* did not make clear, however, whether the statement itself must be attributed on its face to the defendant." App. 21a.

In fact, the Fourth Circuit noted that post *Wright*, the Southern District of New York, in *In re Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 334 (S.D.N.Y. 2004) suggested that direct attribution is not required.[14] App. 18a. Moreover, a Second Circuit opinion, post-*Wright*, held that "plaintiffs may adequately plead reliance against corporate officers for statements appearing in analyst reports not directly

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[14] While petitioners takes the Fourth Circuit to task for relying on pre-*Stoneridge* caselaw, Pet. at 13, petitioners' efforts to concoct an inter-circuit conflict rely exclusively on pre-*Stoneridge* holdings.

attributed to the officers." App. 26a (discussing *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000)).[15]

Petitioners are wrong to contend that the Second Circuit's pre-*Stoneridge* opinion in *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007) dispels the Fourth Circuit analysis of *Wright*. Pet. at 16. *Lattenzio*, like *Wright* and *Fidel*, involves a suit by investors in a public company (in this case Warnaco Corp.) against an auditor (Deloitte & Touche), as a result of misrepresentations in the company's quarterly statements. *See Lattanzio*, 476 F.3d at 150. The quarterly reports at issue "were not audited by Deloitte & Touche" (*Id.* at 152), "did not contain an audit opinion by Deloitte and were not attributed to Deloitte when they were disseminated." *Id.* at 154. Nor for that matter, was there an allegation that Deloitte filed the misleading statements, prepared them, that those statements described actions by Deloitte or that Deloitte disseminated the statements. The only auditor involvement was a "review" of the statements. *Id.* at 152. The Second Circuit's pre-*Stoneridge* inquiry turned on whether the auditor's "review" of an unaudited statement made by others can constitute "making" a statement. *See id.* at 155. Insofar as that court required attribution, it just required that "the public's understanding [of the accountant's role] ... [be] based on the accountant's articulated statement." *Id.* As there was no public

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[15] The Fourth Circuit, citing these and other opinions, noted that "a number of courts, even in circuits that have adopted a direct attribution requirement, have concluded that in certain circumstances auditors and corporate officers may be responsible for statements issued by the corporation's analysts that were not directly attributed to the auditors or officers." App. 24a.

proclamation concerning the role Deloitte might have played in drafting or even reviewing Warnaco's public statements, *Lattanzio* is quite different from the case at bar.[16]

The Fourth Circuit also recognized that the Tenth Circuit's *Anixter* opinion did not require direct attribution on the face of the document as a predicate for liability. The court in *Anixter* concluded that "[a]n accountant's false and misleading representations in connection with the purchase or sale of any security, if made with the proper state of mind and if relied upon by those purchasing or selling a security, can constitute a primary violation." *See* App. 22a (quoting *Anixter*, 77 F.3d at 1226.)[17]

The Fourth Circuit's opinion does not conflict with *Ziemba* either. Plaintiffs there sued a law firm that made no false statements directly, but allegedly played a role in drafting, reviewing and editing fraudulent statements by its client. *Ziemba*, 256 F.3d

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[16] Moreover, the holding in *Lattenzio* was based on certain circumstances unique to the relationship between an independent auditor and a public corporation. Specifically, the court noted that "the importance plaintiffs place on an accountant's *review* of *interim* financial statements is further eroded by the numerous duties and requirements associated with an accountant's *audit* of *annual* financials. Clearly, Congress knows how to impose duties on accountants and expose them to liability when it wants to do so." 476 F.3d at 156 (emphasis in original).

[17] *Anixter* did not concern pleading standards on a motion to dismiss. The decision came post-trial, and concerned a jury instruction concerning aiding and abetting, which, post-*Central Bank*, was no longer a viable theory. The court, in remanding, noted that the defendant who was the subject of the "aiding and abetting" jury instruction (an auditor), could in fact be held primarily liable for his actions. *See id.* 77 F.3d at 1227.

at 1202. There was nothing in the client's filings that gave investors any reason to believe that the law firm was the source of the information. The information did not concern the law firm's conduct; there was no reason to believe that the client itself had no operations; and there is no evidence that the law firm disseminated these misrepresentations with knowledge that they were misleading. The court held that primary liability should not attach "to those who were never identified to investors as having played a role in the misrepresentations." *Id.* Importantly, the court still recognized that a disclosure duty might exist even where the defendant itself does not speak, depending on:

> the relationship between the plaintiff and the defendant, the parties' relative access to the information to be disclosed, the benefit derived by the defendant from the purchase or sale, *defendant's awareness of plaintiff's reliance on defendant in making its investment decision, and defendant's role in initiating the purchase or sale.*

Id. (quoting *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986)) (emphasis added).

The opinion in *SEC v. Wolfson*, 539 F.3d 1249 (10th Cir. 2008) is, as petitioners acknowledge, *dicta* insofar as liability in private 10(b) actions was concerned. The court merely observed that in some circuits, as reflected in the *Ziemba* and *Wright* opinions, courts require some degree of attribution as a pre-requisite for 10(b) liability in a private action. *See* 539 F.3d at 1258. Importantly, the court noted in this

dicta discussion that even *Wright* and *Anixter* did not require that the alleged violator directly communicate misrepresentations to the investors for primary liability to attach, *id.* at 1259 n.15.[18]

B. The Ruling Does Not Have the Far Reaching Ramifications That Petitioners Contend.

Petitioners overstate the potential ramifications of the Fourth Circuit's ruling. The ruling would not, as petitioners contend, open the door to potential fraud liability on the part of all sorts of peripheral service providers to public corporations.

Although petitioners seek to cast JCM in the role of a mere "service provider" for the Janus Funds, the record tells a very different story. JCM did not merely provide services for the Janus Funds, rather JCM handled all of those Funds' operations. App. 27a-30a. These operations included, but were not limited to, drafting, reviewing and filing the Fund prospectuses. *In re Mut. Funds*, 590 F. Supp. 2d at 747; C.A. App. 484, ¶¶ 21, 26. JCM also distributed and disseminated the prospectuses. C.A. App. 484, ¶ 21; App. 30a. *Contra Stoneridge*, 552 U.S. at 155 ("Respondents had no role in preparing or disseminating Charter's financial statements.").

JCM did so with knowledge of the market timing arrangements that rendered the JCM-prepared prospectuses misleading. App. 9a-10a; App. 97a-100a, ¶¶ 87-88.

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[18] The *Wolfson* court made no mention whatsoever of this Court's ruling in *Stoneridge*.

There was also a considerable overlap in the management structure of JCM and the Funds, as all of the Fund officers were also JCM officers. C.A. App. 376-77.

And, of course, the misleading statements related to JCM's own conduct as the administrator of the Funds. C.A. App. 484 ¶¶ 20-22.

As the Fourth Circuit noted, this structure (wherein the fund itself has no operations of its own) is typical of mutual funds, so that most investors familiar with mutual funds have an expectation that the actual running of the Fund and preparing of the relevant documents is accomplished by the Fund manager, not the Fund itself. App. 29a-31a. As such, the latter is generally understood in the marketplace to be a shell without operation.

Thus, the Fourth Circuit's opinion does not change the existing body of authority that holds that in most ordinary situations, outside professionals and service providers are not responsible to investors for misleading statements in an issuer's public filings. Simply put, a holding that finds potential liability in the foregoing situation has little or no bearing on the exposure of ordinary service providers or professionals, even those who might assist in the drafting of publicly filed documents, for the following reasons:

> Generally, there is nothing in the public statements of the issuer that gives investors any reason to believe that the service provider is "making" those statements – certainly not representation in the public statements that the

service provider is performing *all* of the issuer's operations.

- Those service providers generally do not have overlapping management with the issuer.

- The documents prepared by the service providers are not describing the operations and conduct of the service providers.

- There is rarely evidence that the service provider knows of the false or misleading nature of these documents.

Even before the Fourth Circuit's ruling, other courts had found the potential for liability on the part of professionals or service providers – even professionals and service providers that did not control all of the operations of the issuer and do not have interlocking management with the issuer – when the nature of the relationship was such that investors would have reasonably expected that these outsiders played a role in the statements at issue. *See Global Crossing, supra,* 322 F. Supp. 2d at 334; *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 166 (D. Mass. 2002) (both discussed by Fourth Circuit at 24a-25a).

There is at least one other reason why the questions raised herein are of little or no potential far reaching import and that, even assuming arguendo, the Fourth Circuit misapplied *Stoneridge*. Specifically, Senator Arlen Specter (D-Pa.) introduced the "Liability for Aiding and Abetting Securities Violations Act of 2009" S.1551, 111th Cong., on July 30, 2009, which has been referred to the Committee on the Judiciary

where hearings to consider the bill were held on September 17, 2009.

The stated purpose of the bill is to "amend section 20 of the Securities Exchange Act of 1934 to allow for a private civil action against a person that provides substantial assistance in violation of such act.". S.1551. Considering this potential legislation, it would be an imprudent use of this Court's limited resources to expand upon the guidance it provided in *Stoneridge* when Congress is contemplating a statutory solution that would obviate petitioners' otherwise-imagined conflict among the circuits.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their petition. Therefore, respondent respectfully requests that the petition be denied.

Dated: December 2, 2009

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REPLY BRIEF

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IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

In the decision below, the Fourth Circuit split with several other circuits in two important respects that warrant this Court's review. *First*, in holding that a service provider "made the misleading statements" contained in the prospectuses of a different company "by participating in the writing and dissemination of [those] prospectuses," the Fourth Circuit authorized secondary liability in a manner that directly conflicts with prior decisions of this Court and other courts of appeals. Pet. App. 18a (emphasis omitted). *Second*, in rejecting the "direct attribution" test for reliance and concluding that a service provider can be held liable for a statement in another company's prospectus "even if the statement on its face is not directly attributed" to the service provider, the Fourth Circuit adopted the minority side of a 3–2 circuit split. *Id.* at 24a.

I. THE COURTS OF APPEALS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

Lead plaintiff First Derivative Traders contends that the Fourth Circuit's decision did not create a conflict among the courts of appeals. BIO 1. This is a remarkable approach in a case involving an *acknowledged* circuit split: The Fourth Circuit itself recognized that "[t]he courts of appeal have diverged over the degree of attribution required to plead reliance." Pet. App. 19a. And the Fourth Circuit also recognized that the majority rule would require affirmance of the dismissal in this case. *Id.* at 17a (concluding that "the individual fund prospectuses are unattributed on their face").

Lead plaintiff's attempt at misdirection rests primarily on limiting the conflicting cases to their *facts*,

while ignoring the *legal* conclusions that compelled the results in those cases. It argues, for instance, that JCM's assistance with the Janus Funds' prospectuses was more substantial than a typical service provider's role in its client's statements. *E.g.*, BIO 2. Even if this were so, the cases rejecting service providers' liability for the misstatements of their clients reached that result because of the legal conclusion that participation in others' misstatements is not a basis for primary liability. However substantial the alleged participation, imposing liability on the sole basis that a service provider "helped draft the misleading prospectuses" (Pet. App. 17a) contravenes this Court's holdings in *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), and *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that there is no aiding-and-abetting liability in private actions brought under Section 10(b) of the Exchange Act.

Nothing in the opposition brief casts doubt on the importance of the questions presented. Indeed, the opposition brief all but concedes the profound practical implications of the Fourth Circuit's decision. Even lead plaintiff acknowledges that the relationship between JCM and the Janus Funds that led the Fourth Circuit to impose liability is "typical" of the entire mutual fund industry. BIO 22. Thus, even on lead plaintiff's (incorrect) view that the decision below does not apply to other service providers, that decision announces—at minimum—a sweeping new rule of aiding-and-abetting liability under which each investment adviser to a mutual fund can be held liable for statements in the fund's prospectuses.

In light of the irreconcilable circuit splits, the direct conflict with this Court's precedent, and the significant practical implications of the Fourth Circuit's decision, there is a compelling need for this Court to grant review.

A. The Courts Of Appeals Are Divided On Whether "Participation" Suffices For Primary Liability

Lead plaintiff claims that the Fourth Circuit "did not create a circuit split when it concluded that respondent ple[aded] JCM's primary liability for statements that JCM participated in drafting and then filed with the SEC and disseminated publicly." BIO 12. According to lead plaintiff, the extent of JCM's alleged participation in the Janus Funds' prospectuses distinguishes this case from decisions rejecting liability for service providers that participated in others' misstatements. *Id.* at 12–14. Lead plaintiff is incorrect.

The disagreement between the courts of appeals is not over *how much* participation in a third party's misstatement suffices for primary liability. It is, instead, whether such participation can *ever* give rise to primary liability. Consistent with this Court's decision in *Stoneridge*, which rejected liability for "providing assistance" to a company that made false statements (552 U.S. at 162), the courts of appeals other than the Fourth Circuit have rejected liability for service providers who did not themselves make any misstatements. *See Regents* v. *CSFB*, 482 F.3d 372, 390 (5th Cir. 2007) (rejecting liability for banks who "participat[ed]" in transactions that made a third party's misstatements "more plausible"); *In re Charter Commc'ns, Inc. Sec. Litig.*, 443 F.3d 987, 992 (8th Cir. 2006) (rejecting liability for equipment

vendors who "knowingly aided and abetted" another company's misstatements but "did not issue any misstatement"), *aff'd sub nom. Stoneridge*, 552 U.S. 148; *Fidel* v. *Farley*, 392 F.3d 220, 235 (6th Cir. 2004) (rejecting liability for an auditor that permitted its client to report misleading unaudited financial results because the auditor "itself did not make a material misstatement or omission with regard to the unaudited financials").

Lead plaintiff's attempt to limit these decisions to their respective facts ignores the critical, undisputed point that the misstatements alleged in this case, as in each of those cases, were contained in the prospectuses of a third party—here, the Janus Funds. *See* Pet. App. 8a. The Fourth Circuit did not hold that any statement by the Janus Funds was, in fact, a statement by JCM, nor could it have done so: The Janus Funds are separate legal entities from JCM and are governed by a board of trustees that must satisfy federal standards of independence from JCM. *See, e.g.*, *Burks* v. *Lasker*, 441 U.S. 471, 482 (1979). Instead, the Fourth Circuit held that, by "*participating* in the writing and dissemination of the prospectuses," JCM "*made* the misleading statements contained in the documents." Pet. App. 18a (first emphasis added).

In allowing this "participat[ion]" to transform the Janus Funds' alleged misstatements into misstatements "made" by JCM, the Fourth Circuit split with its sister circuits. Its conclusion that lead plaintiff's allegation that JCM "*helped* draft the misleading prospectuses" (Pet. App. 17a (emphasis added)) is sufficient directly contravenes this Court's repeated holdings that there is no private aiding-and-abetting ("helping") liability for securities fraud. Tellingly,

lead plaintiff nowhere even tries to explain how "helping" to draft another company's prospectus could be anything *other than* secondary liability.

B. The Courts Of Appeals Are Divided On Whether "Direct Attribution" Is Required To Plead Reliance

The Fourth Circuit acknowledged that "[t]he courts of appeal have diverged over the degree of attribution required to plead reliance." Pet. App. 19a. Lead plaintiff ignores this express recognition of a circuit split and claims that the Fourth Circuit somehow "harmonized" its decision with the conflicting approaches adopted by other courts of appeals. BIO 15. It is unclear how the Fourth Circuit could have achieved such "harmon[y]" by taking sides in an existing split, and in any event it did not claim to do so. Instead, the Fourth Circuit rejected the "direct attribution" requirement applied by the Second, Tenth, and Eleventh Circuits (which would require affirmance of the dismissal order) and, to reverse, adopted instead the Ninth Circuit's erroneous "substantial participation" test. Pet. App. 23a–24a. The circuit split thus is not just implicated but outcome-determinative in this case.

The Fourth Circuit acknowledged that the majority approach "requires direct attribution of the allegedly misleading statement to the defendant." Pet. App. 20a. That test is not met on the facts of this case. The court below concluded, however, that the appropriate inquiry was instead "whether interested investors would attribute to the defendant a substantial role in preparing or approving the allegedly misleading statement." *Id.* at 24a. In the Fourth Circuit's view, "[d]irect attribution of a public statement, while undoubtedly sufficient to establish

fraud-on-the-market reliance, is an inexact proxy for determining whether investors will attribute a publicly available statement to a particular person or entity." *Ibid.* Thus, "a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly infer that interested investors would have known that the defendant was responsible for the statement at the time it was made, *even if the statement on its face is not directly attributed to the defendant.*" *Id.* at 23a–24a (emphasis added).

Notwithstanding the Fourth Circuit's recognition that the majority rule requires "direct attribution," lead plaintiff claims that a later case from the Southern District of New York "suggest[s] that direct attribution is not required" in the Second Circuit. BIO 17 (citing *In re Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 334 (S.D.N.Y. 2004)). This district court decision could not, of course, overrule the Second Circuit's decision in *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998), nor could it undermine application of the direct-attribution test in the Tenth and Eleventh Circuits. *See Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *SEC* v. *Wolfson*, 539 F.3d 1249, 1258–60 (10th Cir. 2008). And lead plaintiff's argument that direct attribution is no longer required in the Second Circuit is foreclosed in any event by *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007), which dismissed private securities-fraud claims on direct-attribution grounds.

Lead plaintiff claims that "*Lattanzio* is quite different" from this case because "there was no public proclamation concerning the role Deloitte [the auditor-defendant] might have played in drafting or even reviewing Warnaco's [the client's] public state-

ments." BIO 18–19. This is inaccurate. The misstatements at issue there were contained in a public company's quarterly financial statements, and a public proclamation—a federal regulation—"required Deloitte, as Warnaco's outside accountant, to conduct a review of Warnaco's quarterly statements." 476 F.3d at 154. As the Second Circuit recognized, this "requirement that an issuer's accountant review interim financial statements supports an understanding among the investing public that such reviews are in fact conducted." *Id.* at 155. The Second Circuit nonetheless rejected liability because, "[u]nless the public's understanding is based on *the accountant's* articulated statement, the source for that understanding—whether it be a regulation, an accounting practice, or something else—does not matter." *Ibid.* (emphasis added).

Lead plaintiff also contends that the direct attribution requirement adopted by the Second, Tenth, and Eleventh Circuits has been displaced by this Court's decision in *Stoneridge*. According to lead plaintiff, "[f]ar from requiring direct attribution as a predicate for liability, this Court noted in *Stoneridge* that no statements are necessary, *so long as* the defendants' actions are a necessary part of the fraud, and *investors relied on defendants' conduct*." BIO 15 (emphasis added). The italicized qualification destroys lead plaintiff's effort to enlist *Stoneridge* in its cause, however, because "the attribution requirement ... stems directly from the *need for private litigants to prove reliance* on an alleged fraud to succeed on a private cause of action." *Wolfson*, 539 F.3d at 1258–60 (emphasis added); *see also, e.g.*, *Wright*, 152 F.3d at 175 (failing to require direct attribution would "circumvent the reliance requirements of the [Exchange] Act, as '[r]eliance only on misrepresenta-

tions made by others cannot itself form the basis of liability'" (quoting *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996))).

Lead plaintiff is conflating two distinct elements of Section 10(b) liability: the requirement that a plaintiff prove a "material misrepresentation or omission by the defendant," and the separate requirement that it prove "reliance upon the misrepresentation or omission." *Stoneridge*, 552 U.S. at 157. This Court recognized in *Stoneridge* that the former element can be satisfied even without a "specific oral or written statement" because "[c]onduct itself can be deceptive." *Id.* at 158. But this does not eliminate the plaintiff's need to prove the latter element—reliance. Indeed, in *Stoneridge* itself, the Court ultimately rejected liability precisely because "th[e] deceptive acts were not communicated to the public." *Id.* at 159. Because the relevant disagreement among the courts of appeals is "over the degree of attribution required to plead reliance" (Pet. App. 19a), that circuit split is not undermined, or even affected, by this Court's acknowledgment that "[c]onduct itself can be deceptive." 552 U.S. at 158.*

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* Lead plaintiff is similarly misguided in attempting to distinguish *Stoneridge* by repeatedly emphasizing that JCM allegedly played a role in disseminating the Janus Funds' prospectuses. *E.g.*, BIO 16. That was Judge Shedd's view below, but he wrote only for himself. Pet. App. 40a–41a (Shedd, J., concurring). The majority, by contrast, expressly rejected that view in concluding that only JCM, and not JCG, could be held primarily liable: "Although JCG, like JCM, played a role in the dissemination of the fund prospectuses on the Janus website, this fact, taken by itself, is insufficient in this case for us to infer that interested investors would believe JCG had prepared or approved the Janus fund prospectuses." *Id.* at 32a. Instead, the Fourth Circuit reasoned that, "[i]n light of the publicly

[Footnote continued on next page]

II. THE DECISION BELOW HAS PROFOUND PRACTICAL IMPLICATIONS

Lead plaintiff does not dispute that this case presents pure questions of federal law regarding the proper interpretation of the implied private right of action under Section 10(b) of the Exchange Act or that it is an ideal vehicle to resolve the questions presented. It contends, however, that the Fourth Circuit's decision rests on the "unique" facts of this case and therefore "would not ... open the door to potential fraud liability on the part of all sorts of peripheral service providers to public corporations." BIO 2, 21. In practically the same breath, lead plaintiff admits that the relationship between JCM and the Janus Funds is "typical of mutual funds." *Id.* at 22. Because it is precisely this relationship that allegedly gives rise to liability, the Fourth Circuit's decision will—at minimum—result in a massive expansion of private securities-fraud liability in the mutual fund industry. *Cf. Jones* v. *Harris Assocs., L.P.*, No. 08-586 (reviewing circuit conflict on question of liability standards for mutual fund advisers).

According to lead plaintiff, mutual funds are typically "structure[d]" so that "the fund itself has no operations of its own." BIO 22. Thus, lead plaintiff claims, "most investors familiar with mutual funds have an expectation that the actual running of the Fund and preparing of the relevant documents is ac-

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[Footnote continued from previous page]
available material, interested investors would have inferred that if JCM had not itself written the policies in the Janus fund prospectuses regarding market timing, it must at least have approved these statements." *Id.* at 31a.

complished by the Fund manager, not the Fund itself." *Id.* Under the Fourth Circuit's approach, this means that *every* investment adviser could be held primarily liable for statements in the prospectuses of the funds it advises, at least if those funds are structured in the "typical" manner. *See* BIO 22. This is a breathtaking expansion of liability in an industry that manages more than $10 trillion in assets.

Lead plaintiff is mistaken, moreover, in claiming that the decision below can be limited to the mutual fund context. The unwarranted expansion of secondary liability sanctioned by the court below will be implicated in every case in which a service provider—such as an accountant, a lawyer, or a bank—helps an issuer prepare its offering materials. Although lead plaintiff assets that "[g]enerally ... nothing in the public statements of the issuer ... gives investors any reason to believe that the service provider is 'making' those statements" (BIO 22–23), this is plainly wrong. When a public company includes unaudited financial statements in its quarterly SEC filings, there is just as much reason for "interested investors [to] attribute" to the company's auditor a "substantial role in ... approving" those statements (Pet. App. 24a), as there is for investors to attribute a mutual fund's prospectuses to its investment adviser: Federal law expressly provides that "interim financial statements included in quarterly reports on Form 10-Q ... must be reviewed by an independent public accountant using professional standards and procedures for conducting such reviews." 17 C.F.R. § 210.10-01(d). The direct-attribution test, unlike the decision below, would reject liability for the auditor in this context. *See Lattanzio*, 476 F.3d at 155.

Finally, lead plaintiff argues that it would be "imprudent" for the Court to consider this case because Senator Specter has introduced a bill that would create private securities-fraud liability for those who provide "substantial assistance" to other violators. BIO 24 (citing S. 1551, 111th Cong. (2009)). Of course, the fact that it would require a statutory amendment to ratify the result reached by the Fourth Circuit in this case is good evidence that the decision below does *not* accurately reflect existing law. Indeed, Senator Specter's bill is expressly designed to "overturn" this Court's decisions in *Stoneridge* and *Central Bank* "by amending the Securities Exchange Act of 1934 to authorize a private right of action for aiding-and-abetting liability." 155 Cong. Rec. S8564 (daily ed. July 30, 2009) (statement of Sen. Specter).

Legislation is frequently introduced in Congress but far more rarely enacted. This Court should not decline review of the important questions raised by the Fourth Circuit's decision merely because legislation has been introduced that, if passed by both houses of Congress and signed by the President, might (if it were applied to pending cases) provide an alternative basis for liability on the facts of this case. To the contrary, this Court should ensure fidelity to its precedents, and secure uniformity among the courts of appeals on important questions affecting the national securities markets, by granting review of the erroneous decision below. Otherwise, the Fourth Circuit will have supplanted the proper roles of both Congress and this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 17, 2009.

AMICUS CURIAE BRIEF

No. 09-525

In the Supreme Court of the United States

JANUS CAPITAL GROUP, INC., ET AL., PETITIONERS

v.

FIRST DERIVATIVE TRADERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an investment adviser to a mutual fund "made" misleading statements for purposes of liability under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), by participating in the drafting and dissemination of misleading prospectuses of mutual funds it managed.

2. Whether misleading statements in a mutual fund's prospectuses must be explicitly attributed to the mutual fund's investment adviser in order to establish the reliance element of a private Section 10(b) action against the adviser.

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In the Supreme Court of the United States

No. 09-525

JANUS CAPITAL GROUP, INC., ET AL., PETITIONERS

v.

FIRST DERIVATIVE TRADERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This case is a private action filed pursuant to Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5. Section 10(b) makes it "unlawful for any person, directly or indirectly, * * * [t]o use or employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may pre-

scribe." 15 U.S.C. 78j(b). Pursuant to its Section 10(b) rulemaking authority, the Securities and Exchange Commission (Commission or SEC) has promulgated Rule 10b-5, which makes it "unlawful for any person, directly or indirectly, * * * [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made * * * not misleading, * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b).

The Commission is authorized to bring civil enforcement actions to prevent and punish violations of Section 10(b). See 15 U.S.C. 78u(d)(1) (suits for injunctive relief); 15 U.S.C. 78u(d)(3)(A) (suits for civil penalties). This Court has also inferred the existence of a private right of action from "the words of the statute and its implementing regulation." *Stoneridge Inv. Partners, LLC.* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). As the Court has elaborated:

> In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Ibid. (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005)). With respect to the reliance element, this Court has held that a rebuttable presumption of reliance can be supported by the fraud-on-the-market theory, under which the market price of a stock reflects "most publicly available information," including "any public material misrepresentations." *Basic Inc.* v.

Levinson, 485 U.S. 224, 242, 247 (1988); see *Stoneridge*, 552 U.S. at 159.

2. Petitioner Janus Capital Group Inc. (JCG) is a publicly traded asset management firm that sponsors a family of mutual funds known as the Janus Funds. Petitioner Janus Capital Management LLC (JCM), a wholly-owned subsidiary of JCG, is the investment adviser to the Janus Funds. Pet. ii; Pet. App. 59a.

Respondent, the lead plaintiff in this putative class action, alleges that JCG and JCM violated Section 10(b) and Rule 10b-5 because the prospectuses of several of the Janus Funds "created the misleading impression that [JCG and JCM] would implement measures to curb market timing in the Janus Funds," when in fact "secret arrangements with several hedge funds" permitted "market timing transactions,"[1] to the alleged detriment of long-term investors in the Funds. Pet. App. 60a-61a. The suit is brought on behalf of shareholders of JCG. *Id.* at 59a. The complaint alleges that class members purchased shares of JCG's stock at inflated prices between 2000 and the public revelation in 2003 of the market-timing arrangements, after which many investors withdrew from the Janus Funds and the price of JCG's stock fell. *Id.* at 59a, 62a-63a.

The operative complaint alleges that JCM, in its capacity as investment adviser to the Janus Funds, is "responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds." Pet. App. 65a. Thus, although "each mutual fund is in fact its own company," the complaint alleges that "as a practical matter the management company runs it." *Id.*

[1] The term "market timing" refers to "the practice of rapidly trading in and out of a mutual fund to take advantage of inefficiencies in the way the fund values its shares." Pet. App. 5a-6a.

at 71a. The complaint alleges that prospectuses for several of the Janus Funds stated that the Funds were not intended for market timing and that measures had been put in place to deter such activities. *Id.* at 72a-80a. The complaint alleges that the "policy against market timers" common to all of those Funds was written and represented by "Janus" (referring collectively to JCG and JCM). *Id.* at 59a, 69a. The complaint also alleges that JCM disseminated the Funds' prospectuses to potential investors, and that JCG made the most recent prospectus for each of the Funds available on its website. *Id.* at 71a-72a.

3. The district court granted petitioners' motion to dismiss the complaint. Pet. App. 42a-53a. With respect to petitioner JCG, the court concluded that the complaint contained no allegations that JCG "actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it." *Id.* at 46a. With respect to petitioner JCM, the district court did not determine "whether JCM made the alleged misstatements," *id.* at 50a n.5, because it held that a mutual fund's investment adviser owes no duty to the shareholders of its parent company when those shareholders have not purchased shares of the mutual fund. *Id.* at 49a-53a.

4. The court of appeals reversed. Pet. App. 1a-41a. As relevant here, the court held that respondent had adequately alleged that (a) petitioners had "made" the allegedly misleading statements, (b) the statements at issue were properly "attributable" to petitioner JCM, and (c) respondent had adequately pleaded a claim of control-person liability against petitioner JCG.

a. The court of appeals held that respondent's complaint adequately alleged that petitioners had made the

statements in the prospectuses. Recognizing that "a plaintiff must plead with particularity" under Rule 9(b) of the Federal Rules of Civil Procedure, the court summarized respondent's allegations as follows:

> Specifically, the complaint alleges that [petitioners] "wrote and represented [their] policy against market timers," and "publicly issued false and misleading statements." The complaint also alleges that [petitioners] "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans." According to the complaint, [petitioners] made these representations by "caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public," through filings with the SEC and dissemination on a joint Janus website.

Pet. App. 17a-18a (some brackets in original; quoting passages now reprinted at Pet. App. 69a, 109a, 60a, and 60a, respectively). The court concluded that those "statements, taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a.

b. The court of appeals observed that the plaintiff in a private Section 10(b) suit "must allege that it relied on the defendant's false or misleading statement." Pet. App. 15a. The court stated that, to establish reliance under a fraud-on-the-market rationale, a plaintiff must show that the defendant made "a misrepresentation that is public and is attributable to the defendant." *Id.* at 18a. The court further stated that other courts of ap-

peals had "diverged over the degree of attribution required to plead reliance." *Id.* at 19a. The court described the Second and Eleventh Circuits as concluding that "reliance under § 10(b) * * * requires direct attribution of the allegedly misleading statement to the defendant." *Id.* at 20a; see *id.* at 20a-21a. By contrast, it described the Ninth Circuit as having held that, even without "public attribution," a primary violation could be established on the basis of "substantial participation or intricate involvement in preparing the misleading statement." *Id.* at 22a.

Recognizing that this case "arises in the limited context of fraud-on-the-market," the court of appeals declined to "establish an attribution standard for all reliance inquiries." Pet. App. 23a. For purposes of "fraud-on-the-market reliance," however, it held that "the public attribution element of the reliance inquiry" could be established by proving "that interested investors * * * would attribute the allegedly misleading statement to the defendant." *Id.* at 23a, 24a. The court of appeals discussed cases involving corporate officers, *id.* at 24a-27a, and stated that it was necessary to "analyze[] the precise relationship between the defendant and the entity or analyst issuing the allegedly misleading statement in order to determine whether the statement was attributable to the defendant," *id.* at 27a.

Applying that mode of analysis, the court of appeals found respondent's allegations sufficient to establish that the misleading statements were attributable to JCM. Pet. App. 27a-31a. The court emphasized respondent's allegations that JCM, as the investment adviser to the Janus Funds, is responsible for "day-to-day management" and, "as a practical matter," runs each of the Janus Funds. *Id.* at 27a. The court noted that "JCM is

listed as investment adviser to the funds in the prospectuses and the statements of additional information for each of the Janus Funds, and its duties are detailed in these documents." *Id.* at 28a. Under these circumstances, the court "conclude[d], at the Rule 12(b)(6) stage, that * * * interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses, particularly the content pertaining to the funds' policies affecting the purchase or sale of shares." *Id.* at 31a.

c. The court of appeals held that the allegations against JCM's parent company, JCG, were insufficient to state a claim of primary liability under Section 10(b) because JCG was not the investment adviser and therefore was not "well known to be intimately involved in the day-to-day operations of the mutual funds." Pet. App. 32a. The court acknowledged that "JCG, like JCM, played a role in the dissemination of the fund prospectuses on the Janus website," but found that this limited role was insufficient to cause interested investors to "believe JCG had prepared or approved the Janus fund prospectuses." *Ibid.*[2] The court concluded, however, that respondent had adequately pleaded a claim of control-person liability against JCG under Section 20(a) of the Exchange Act, 15 U.S.C. 78t(a). Pet. App. 36a-40a.[3]

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[2] In a concurring opinion, Judge Shedd disagreed with that aspect of the court's opinion. In his view, a reasonable investor would have attributed statements in the prospectuses to JCG as well as JCM, in light of respondent's allegation that JCG had published them on its website. Pet. App. 40a-41a.

[3] Petitioners do not challenge that aspect of the court of appeals' decision (except to the extent it assumes there is a valid Section 10(b) claim against JCM).

DISCUSSION

Neither of the questions presented warrants this Court's review. As the court of appeals correctly held, respondent's complaint adequately alleged both that JCM had made false and misleading statements, and that respondent and other members of the putative class had relied to their detriment on those statements. The Fourth Circuit's decision does not conflict with decisions of this Court or any other court of appeals. Although petitioners characterize JCM as a mere "service provider" to the Janus Funds, respondent's complaint alleged that JCM was responsible for the Funds' day-to-day management, and that allegation is consistent with standard practice in the mutual-fund industry. The cases on which petitioners rely, by contrast, involved efforts to impose Section 10(b) liability on corporate "outsiders" (*e.g.*, outside accounting firms or law firms) for false statements made by their issuer clients.

A. The Allegations In Respondent's Complaint Are Sufficient To Withstand A Motion To Dismiss

1. The court of appeals properly took account of the unique and close relationship between a mutual fund and its investment adviser

Petitioners contend (Pet. 11) that JCM was "merely a service provider" to the Janus Funds. Petitioners emphasize (Pet. 2, 11) that the various funds are "separate legal entities that are not owned" by JCM and have "separate boards of trustees and separate legal counsel." Petitioners argue on that basis (Pet. 8, 9) that they cannot be held liable for the allegedly misleading statements in this case because those statements were made by "another," "different" company rather than by petitioners themselves.

Petitioners' argument is inconsistent with the allegations in respondent's complaint (which must be taken as true at this stage of the case), and it misapprehends the relationship that generally exists between a mutual fund and its adviser. Respondent's complaint alleges that JCM, in its role as the investment adviser to the Janus Funds, "is responsible for the day-to-day management of * * * [the] business affairs of the funds." Pet. App. 65a. The complaint further alleges that "[w]hile each mutual fund is in fact its own company, as a practical matter the management company runs it." *Id.* at 71a.

The relationship between JCM and the Janus Funds that is described in respondent's complaint accords with usual industry practice. Unlike more typical "service provider[s] * * * such as an accountant, a lawyer, or a bank" (Pet. Reply Br. 10), an investment adviser's unique and close relationship with the fund makes it essentially a corporate insider. As the Commission has explained: "[T]he term 'investment adviser' is to some extent a misnomer" because "[t]he so-called 'adviser' is no mere consultant. He is the fund's manager. Hence the investment adviser almost always controls the fund." *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977) (*Steadman*) (citations omitted); see *Short Selling in Connection with a Public Offering*, 72 Fed. Reg. 45,100 n.71 (2007) (quoting *Steadman*). In *Steadman*, the Commission concluded that, because an investment adviser "manages the fund's affairs" and "is normally the only audible voice in day-to-day management," an investment adviser's status as such "is normally enough" to rebut a statutory presumption that a person who owns less than 25% of a company's voting securities does not control that company. 46 S.E.C. at 920 n.81.

Like the Commission, courts have recognized the control that an investment adviser typically exercises over a mutual fund. This Court recently observed that it is "typical" for an investment adviser to "create[] the mutual fund," "select[] the fund's directors, manage[] the fund's investments, and provide[] other services" to the fund. *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010). That description is consistent with the Court's statement more than 25 years ago that a mutual fund "is typically created and managed by a pre-existing external organization known as an investment adviser," which "generally supervises the daily operation of the fund." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 536 (1984).[4] See also *Burks* v. *Lasker*, 441 U.S. 471, 480-481 (1979) ("Most funds are formed, sold, and managed by external organizations, [called 'investment advisers,'] that are separately owned and operated. . . . The advisers select the funds' investments and operate their businesses.") (brackets in original) (quoting S. Rep. No. 184, 91st Cong., 1st Sess. 5 (1969)). And the Second Circuit has explained that the "management structure" of mutual funds "contrasts sharply with that of a typical corporation" because "[c]ontrol of a mutual fund * * * lies largely in the hands of the investment adviser, an external business entity." *Tannenbaum* v. *Zeller*, 552 F.2d 402, 405, cert. denied, 434 U.S. 934 (1977).

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[4] Consistent with the understanding of industry practice reflected in the Commission's decision in *Steadman*, the brief for the SEC in *Daily Income Fund* stated (at 10) that "the adviser of an investment company typically exercises at least as much control over the company as internal management does in other corporations."

2. *Respondent's complaint adequately alleges that JCM made misrepresentations in the Funds' prospectuses*

a. Even if it is not the issuer itself, a defendant who has participated to a sufficient degree in the drafting or dissemination of misleading statements can be primarily liable under Section 10(b). Thus, when a person, acting alone or with others, creates a misrepresentation or causes it to be made, that person can be liable as a primary violator—assuming that the person acts with scienter, which must be pleaded "with particularity," 15 U.S.C. 78u-4(b)(2).

Respondent alleges that petitioners "wrote and represented [their] policy against market timers," Pet. App. 69a; that they "publicly issu[ed] false and misleading statements" regarding that policy, *id.* at 109a; that petitioners "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors," *id.* at 60a; and that petitioners "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [petitioners] would implement measures to curb market timing in the Janus Funds," *ibid.* As the court of appeals correctly explained, "[t]hese statements, taken together, allege that [petitioners], by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a.[5]

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[5] Courts have recognized that individual employees or officers can be liable under Section 10(b) for having "made" statements that were issued in the name of the company rather than of the employees themselves. See, *e.g.*, *McConville* v. *United States SEC*, 465 F.3d 780, 786-787 (7th Cir. 2006) (corporate official who had "substantial involvement in drafting the financial statements" in company's SEC filing can be

In determining the adequacy of respondent's complaint, the allegations regarding petitioners' responsibility for the specific documents at issue should be read in light of respondent's allegations that JCM exercised general management control over the Funds. Because the typical outside service provider (such as a law firm or accountant) is not responsible for the "day-to-day management" (Pet. App. 59a, 65a) of the clients it advises, a claim that the outside provider "made" a statement issued in the company's name might require more particularized factual allegations regarding the provider's role in the statement's drafting and dissemination. In this case, however, respondent's complaint adequately alleged that JCM controlled the drafting and dissemination of the misleading prospectuses as one aspect of its general control over the Funds' affairs.

b. The court of appeals described respondent's complaint as alleging that petitioners "*helped* draft the misleading prospectuses" and "*participat[ed]* in the writing and dissemination of" those documents. Pet. App. 17a, 18a (emphases added). Petitioners contend (Pet. 11-13) that, by treating those allegations as sufficient, the

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primarily liable under Section 10(b), even though "she did not sign or physically file the" document), cert. denied, 552 U.S. 811 (2007); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 75-76 (2d Cir.) (corporate official could be primarily liable for corporation's false statements, notwithstanding his contention that misrepresentations were not "attributable to him," because he "was involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements issued by" corporation), cert. denied, 534 U.S. 1071 (2001); cf. *SEC* v. *Wolfson*, 539 F.3d 1249, 1251, 1261 (10th Cir. 2008) (non-employee consultant who "played a significant role within the company" could be held liable under Section 10(b) for misstatements in SEC filings that he prepared, even though they "were issued in [the company's] name" and he "did not sign, certify, or physically file" them).

Fourth Circuit disregarded this Court's holding that "[t]he § 10(b) implied private right of action does not extend to aiders and abettors." *Stoneridge Inv. Partners, LLC.* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008); see *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). That argument is misconceived. To be sure, not *every* form of assistance to an unlawful securities fraud will constitute a primary violation. But the mere fact that a particular defendant requires the help of others to consummate a fraud does not preclude the imposition of primary liability. See *ibid.* (explaining that "[i]n any complex securities fraud * * * there are likely to be multiple [primary] violators").

Neither *Central Bank* nor *Stoneridge* addresses the question presented here—*i.e.*, whether primary liability in a private Section 10(b) suit may be imposed on a defendant who, through the exercise of day-to-day management control over another entity, causes false or misleading statements to be issued in that entity's name. The Court in *Central Bank* held that there is no implied private right of action against a party who merely aids and abets a violation of Section 10(b). See 511 U.S. at 191. The Court explained, however, that "[a]ny person or entity, including a lawyer, accountant, or bank, who * * * makes a material misstatement (or omission)" may be liable as a primary violator. *Ibid.* Although the primary violators identified by the Court include those who "make[]" a misstatement, the Court did not further explain what that term means.

In *Stoneridge*, the Court considered whether the element of reliance, which is required in private actions (though not in suits brought by the Commission), had been adequately pleaded. 552 U.S. at 159. Although the

Court reiterated that aiders and abettors are not subject to Section 10(b) liability in private suits, *id.* at 158, it did not define what it means to "make" a statement. In particular, because the defendants in *Stoneridege* "had no role in preparing or disseminating" the allegedly false financial statements, *id.* at 155, the Court had no occasion to decide what type or degree of participation in the drafting or dissemination of such statements would be necessary to support primary liability.

3. Respondent's complaint adequately alleges that members of the putative class relied to their detriment on the alleged false statements

Petitioners contend (Pet. 14-15) that, even if JCM "made" misleading statements in the prospectuses, JCM cannot be held liable because those statements were not "directly attributed" to it. Petitioners argue (Pet. 15-17) that direct attribution is necessary to establish the reliance element of a private Section 10(b) action. The court of appeals agreed with petitioners that, to be actionable under a fraud-on-the-market theory, a misrepresentation must be both "public" and "attributable to the defendant." Pet. App. 18a. The court concluded, however, that respondent had satisfied the attribution requirement because, "given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses." *Id.* at 31a. Although the court erred in holding that attribution was required in the circumstances of this case, the court was correct in holding that any attribution requirement was satisfied.

a. Contrary to the court of appeals' conclusion, respondent's ability to proceed under a fraud-on-the-

market theory does not depend on proof that the Janus Fund prospectuses were publicly attributed to JCM at the time they were issued. To establish the elements of a private Section 10(b) cause of action, a private plaintiff must show, *inter alia*, that it relied on the misstatement in question. Under the fraud-on-the-market theory, "reliance is presumed when the statements at issue become public," because it can then "be assumed that an investor who buys or sells stock at the market price relies upon the statement." *Stoneridge*, 552 U.S. at 159.

Neither this Court's articulations of the fraud-on-the-market theory nor the theory's underlying rationale supports a categorical requirement that the alleged false statement must have been attributed to the defendant when it was issued.[6] To be sure, circumstances may occasionally arise in which the likelihood that investors would rely on a particular public statement, and thus the reasonableness of applying the fraud-on-the-market presumption, will depend on the perceived identity of the speaker. In this case, however, the alleged false statements regarding the Janus Funds' policies against

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[6] The Court in *Central Bank* viewed private Section 10(b) suits based on an aiding-and-abetting theory as inconsistent with the requirement that private plaintiffs "must show reliance on the defendant's misstatement or omission." 511 U.S. at 180. A plaintiff may rely on a defendant's statements, however, without knowing that they were made by the defendant. Suppose, for example, that a seller of worthless stock disseminates a document that purports to be a favorable appraisal of the stock by an anonymous industry observer, but that in fact has been drafted by the seller himself. A purchaser of such stock could pursue a private Section 10(b) action against the seller by showing (*inter alia*) that the seller "made" (*i.e.*, drafted) the deceptive document, and that the plaintiff relied on the misrepresentations, even though the essence of the fraud was to prevent contemporaneous attribution to the defendant.

market timing appeared in the Funds' own prospectuses. There is no reason to suppose that the investing public's willingness to rely on those statements would have depended on whether the public attributed those statements to JCM or solely to the Funds' own employees.[7]

b. Even assuming, arguendo, that the reliance element of a private Section 10(b) action includes a "public attribution" component (Pet. App. 23a), the court of appeals correctly held that any such requirement was satisfied in this case. As noted above (see pp. 9-10, *supra*), a mutual fund's investment adviser typically exercises control over the fund that is at least equivalent to that exercised by internal management in other corporations. Because the investing public is aware of that relationship, investors would naturally infer that statements in a fund's prospectus bear the imprimatur of the fund's manager. Requiring such statements to be formally attributed to the investment adviser would allow advisers to avoid Section 10(b) liability simply by declining to state explicitly what the investing public already knows. Given the complaint's allegations that JCM performed the "day-to-day management" functions typically associated with investment advisers (Pet. App. 59a, 65a), the court of appeals correctly concluded that reasonable

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[7] Contemporaneous attribution may also be relevant to proving that a particular entity "made" an alleged misstatement. Thus, even if an entity's role in drafting misleading documents is otherwise insufficient to support primary liability, the entity may properly be said to "make" the false statements if it authorizes the documents to be circulated under its own name. In this case, however, JCM's role in the drafting and dissemination of the Funds' prospectuses was sufficient to support primary liability even though the prospectuses were not expressly attributed to it.

investors would have attributed to JCM the prospectuses' statements about market timing.

c. Petitioners contend (Pet. 18-19) that the court of appeals' attribution analysis conflicts with this Court's decision in *Stoneridge*. Unlike petitioners, however, the defendants in *Stoneridge* had "no role in preparing or disseminating [the issuer's false] financial statements." 552 U.S. at 155. The Court explained that the defendants' "deceptive acts were not communicated to the public," and that the plaintiff could not "show reliance upon any of [the defendants'] actions except in an indirect chain that [the Court found] too remote for liability." *Id.* at 159. Here, in contrast, the court of appeals correctly held that, "given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses." Pet. App. 31a. *Stoneridge* does not support petitioners' contention that a defendant that drafts and disseminates a false and misleading document, and whose responsibility for the document is reasonably ascertainable by the investing public, is nevertheless shielded from a private Section 10(b) suit if the document is not *expressly* attributed to it.

B. The Decision Below Does Not Conflict With Decisions Of Other Circuits

1. With respect to the first question presented—whether respondent's complaint adequately alleged that JCM had made misrepresentations in the Janus Funds' prospectuses—petitioners contend (Pet. 13-14) that the decision below conflicts with decisions from the Fifth, Sixth, and Eighth Circuits. Petitioners' reliance on those decisions is misplaced.

Each of the cases petitioners cite dealt with secondary actors that, unlike JCM, did not manage an issuer and had no role in preparing or disseminating the relevant misrepresentations. In the cited Fifth and Eighth Circuit cases, the defendants allegedly participated in transactions that caused issuers' financial statements to be misleading. See *Regents of the Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 377, 386 (5th Cir. 2007), cert. denied, 552 U.S. 1170 (2008); *In re Charter Commc'ns, Inc. Sec. Litig.*, 443 F.3d 987, 989-990 (8th Cir. 2006), aff'd in part *sub nom. Stoneridge Inv. Partners, LLC.* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). In neither of those cases, however, were the defendants alleged to have played a role in the drafting of the misstatements. In *Charter Communications*, the Eighth Circuit noted the plaintiffs' failure to allege that outside vendors had "played any role in preparing or disseminating the fraudulent financial statements." *Id.* at 990. Similarly, in *Fidel* v. *Farley*, 392 F.3d 220 (2004), the Sixth Circuit held that an auditor was not liable for misstatements that involved "unaudited" financial data when the auditor "did not assist in the preparation or presentation of this financial information, nor did it ever express an opinion about it." *Id.* at 235.

Here, by contrast, respondent "allege[s] that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." Pet. App. 18a. The court of appeals' treatment of respondent's allegations as sufficient does not conflict with any of the decisions on which petitioners rely.[8]

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[8] In *SEC* v. *Tambone*, 597 F.3d 436 (2010), the en banc First Circuit recently construed the phrase "make [a] statement" in Rule 10b-

2. With respect to the second question presented, petitioners contend (Pet. 15-17; Pet. Reply Br. 1) that three circuits—the Second, Tenth, and Eleventh—have held that "direct attribution" is a prerequisite to a finding of reliance in a private Section 10(b) action. Petitioners further argue (*id.* at 5) that the Fourth Circuit's rejection of such a requirement was "outcome-determinative in this case." In fact, however, none of the decisions on which petitioners rely requires attribution when the defendant is a corporate insider rather than a secondary actor (such as an auditor or a law firm).

The Second Circuit's views on attribution are most thoroughly expressed in a decision issued last month. See *Pacific Inv. Mgmt. Co. LLC* v. *Mayer Brown LLP*, No. 09-1619-cv, 2010 WL 1659230 (Apr. 27, 2010) (*PIMCO*). In *PIMCO*, the Second Circuit surveyed its prior cases, *id.* at *5-*10, and concluded "that a secondary actor can be held liable in a private damages action brought pursuant to Rule 10b-5(b) only for false statements attributed to the secondary-actor defendant at the time of dissemination." *Id.* at *1. The court applied its attribution requirement to a claim against an outside law firm that had allegedly participated in the creation

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5(b). The court rejected the Commission's argument that the defendants, who knowingly or recklessly used misleading prospectuses to offer and sell securities but who did not themselves create the misleading statements, could be primarily liable under Section 10(b). In rejecting that argument, the court found that, as used in Rule 10b-5(b), the word "make" should be given its "ordinary meaning," which includes to "create" or "cause." *Id.* at 442-443. The decision below is consistent with *Tambone* because respondent's complaint alleges not only that JCM disseminated misleading prospectuses, but also that it participated in the drafting of the prospectuses and wrote and represented (or at least approved of) the Janus Funds' purported policy against market timing. Pet. App. 17a-18a, 31a.

of false statements, and the court expressly limited its requirement to suits against "secondary actor[s]"—a term that it defined as "refer[ring] to lawyers * * *, accountants, or other parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud." *Id.* at *1 n.1. The court noted that investors may "rely on the role corporate executives play in issuing public statements even in the absence of explicit attribution," and it cautioned that its holding did not extend to "claims against corporate insiders." *Id.* at *10 n.6. The Second Circuit's rationale for requiring that a statement be publicly attributed to typical secondary actors was that investors "are more likely to credit the accuracy of" an issuer's statements when those statements have been given the "imprimatur" of a "supposedly impartial assessment" by "a well-known national law or accounting firm." *Id.* at *9.

Contrary to petitioners' claim that this issue is "outcome-determinative" (Pet. Reply Br. 5), neither the facts underlying the Second Circuit's decisions nor its rationale for them indicates that its attribution requirement would apply to a mutual fund's investment adviser. As with corporate executives, investors "rely on the role" of a mutual fund's investment adviser. *PIMCO*, 2010 WL 1659230, at *10 n.6. Similarly, an investment adviser's involvement in an issuer's statements is far more like that of a corporate officer than that of "a well-known national law or accounting firm" giving its "supposedly impartial assessment." *Id.* at *9. There is consequently no reason to conclude that the Second Circuit would apply an attribution requirement to a claim against an investment adviser, especially when that court has not imposed such a requirement on claims against corporate officers. See *id.* at *7 (citing cases).

The other Second and Eleventh Circuit decisions cited by petitioners also involved traditional outside service providers like law firms and accounting firms. See *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 153 (2d Cir. 2007) ("[T]o state a § 10(b) claim against an issuer's accountant, a plaintiff must allege a misstatement that is attributed to the accountant 'at the time of its dissemination.'"); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) ("In order for a secondary actor, such as a law firm or accounting firm, to be primarily liable," the alleged misstatement "must have been publicly attributable to the defendant."); *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 174-175 (2d Cir. 1998) (requiring misrepresentation in the issuer's press release to be attributed to the defendant auditor), cert. denied, 525 U.S. 1104 (1999). And while petitioners contend (Pet. 17; Pet. Reply Br. 6) that the Tenth Circuit has also recognized an attribution requirement, the court in the cited case stated: "We have never adopted an attribution requirement in a private securities case." *SEC* v. *Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008).[9]

In this case, the court of appeals agreed (incorrectly, in our view) with petitioners that contemporaneous "attribution" of the prospectuses to petitioners was essential to respondent's Section 10(b) claim. Pet. App. 18a. In holding that respondent had adequately alleged such

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[9] Similarly, neither of the Ninth Circuit cases in the minority of petitioners' purported split (Pet. 17-18) rejected an attribution requirement. See *Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1061-1063 (2000) (finding CEO could be primarily liable for misrepresentations in a filing that was attributed to him); *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628-629 (1994) (reversing summary judgment for accounting firm without discussing attribution), cert. denied, 516 U.S. 907 (1995).

attribution, the court emphasized the unique relationship between a mutual fund and its investment adviser and the resulting expectation that "interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses." *Id.* at 31a. Because no other court of appeals has reached a different result with respect to investment advisers or similar corporate insiders, there is no circuit conflict that could be resolved by reviewing the decision below.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

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[10] In a concurring opinion in *PIMCO*, Judge Parker suggested that this Court or the en banc Second Circuit might wish to "clarify" whether attribution is necessary. 2010 WL 1659230, at *14. It would be difficult to use *this* case to clarify how any attribution requirement would apply to the circumstances that the courts of appeals have generally addressed, because investment advisers are materially unlike outside service providers such as law firms and accounting firms.

JOINT APPENDIX

Supreme Court, U.S.
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No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,
Petitioners,

v.

FIRST DERIVATIVE TRADERS,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 30, 2009
CERTIORARI GRANTED JUNE 28, 2010

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General Docket
Fourth Circuit Court of Appeals

Court of Appeals Docket #: 07-1607 **Nature of Suit:** 3850 Securities, Commodities, Exchange First Derivative Tr v. Janus Capital Group **Appeal From:** United States District Court for the District of Maryland at Baltimore **Fee Status:** fee paid	**Docketed:** 06/28/2007 **Termed:** 05/07/2009

* * *

Date Filed	#	Docket Text
		* * *
06/28/2007	79	Civil case docketed. ~ [4607596] (BHR)
		* * *
10/31/2008	124	ORAL ARGUMENT heard before the Honorable M. BLANE MICHAEL, DENNIS W. SHEDD and ALLYSON K. DUNCAN. Attorneys arguing case: Ira M. Press for Appellant First Derivative Traders and Mr. Mark Andrew Perry for Appellees Janus Capital Management and Janus

		Capital Group, Incorporated. Courtroom Deputy: Terry Cox. [997968014] [07-1607] (TC)
	* * *	
05/07/2009	141	PUBLISHED AUTHORED OPINION filed. Originating case number: 1:04-cv-00818-JFM,1:04-md-15863-JFM Copies to all parties and the district court/agency. [998094940] [07-1607] (TAF)
	* * *	
05/07/2009	143	JUDGMENT ORDER filed. Decision: reversed and remanded. Originating case number: 1:04-cv-00818-JFM,1:04-md-15863-JFM. Entered on Docket Date: 05/07/2009. [998094958] Copies to all parties and the district court/agency. [07-1607] (TAF)
05/21/2009	144	PETITION for rehearing en banc (FRAP 35) filed by Janus Capital Group, Incorporated and Janus Capital Management. [07-1607] (MAP)
	* * *	

06/02/2009	146	COURT ORDER filed [998111331] denying Motion for rehearing en banc [144] Copies to all parties. [07-1607](BHR)
06/10/2009	147	Mandate issued. Referencing: [143], Judgment Order, [141], Opinion. Originating case number: 1:04-cv-00818-JFM,1:04-md-15863-JFM [07-1607] (BHR)
* * *		

U.S. District Court
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #:
1:03-cv-02403-LTB

Wiggins v. Janus Capital Gr Inc, et al
Assigned to: Judge Lewis T. Babcock
Demand: $0
Cause: 15:78 Securities Exchange Act

Date Filed: 11/26/2003
Date Terminated: 03/26/2004
Jury Demand: Plaintiff
Nature of Suit: 850 Securities/Commodities
Jurisdiction: Federal Question

* * *

Date Filed	#	Docket Text
11/26/2003	1	Class Action COMPLAINT for Violation of Federal Securities Laws (Summons(es) issued); jury demand (bpm) (Entered: 11/28/2003)
* * *		
03/22/2004	12	LETTER from MDL Panel to clerk of court advising case is assigned to MDL 1586 and is being transferred to USDC–Baltimore (former empl) (Entered: 03/25/2004)

03/26/2004	13	Certified copy of Conditional Transfer ORDER by MDL Panel transferring this case into MDL 1586 In re: Mutual Funds Investment Litigation pending in USDC Dist of MD ; entry date : 3/26/04 (lam) Modified on 03/26/2004 (Entered: 03/26/2004)
* * *		

U.S. District Court
District of Maryland (Baltimore)
CIVIL DOCKET FOR CASE #:
1:04-md-15863-JFM

In re: Alger, Columbia, Janus, MFS, One Group, Putnam, Allianz Dresdner
Assigned to: Judge J. Frederick Motz
Lead case: 1:04-md-15861-CCB
Member case: (View Member Case)
Case in other court:
USCA, 06-01789
USCA, 06-01790
USCA, 07-01607

Date Filed: 04/09/2004
Jury Demand: Both

Date Filed	#	Docket Text
* * *		
09/30/2004	365	AMENDED COMPLAINT against Janus Capital Group Inc., Janus Capital Management LLC, filed by First Derivative Traders. (Attachments: # 1 Exhibit Notice)(Press, Ira) (Entered: 09/30/2004)
* * *		

02/25/2005	880	MOTION to Dismiss *Motion of the Janus Capital Defendants To Dismiss the Parent Investor Class Complaint* by A Defendant. Responses due by 3/14/2005 (Attachments: # 1 Memorandum# 2 Exhibit A# 3 Exhibit B# 4 Exhibit C# 5 Exhibit D)(Tulumello, Andrew) (Entered: 02/25/2005)
* * *		
03/01/2006	1698	ORDER in Janus subtrack JFM–04–818 re: Motion to dismiss Janus Parent Investor Class Action. Signed by Judge J. Frederick Motz on 2/27/06. (jnl, Deputy Clerk) (Entered: 03/01/2006)
* * *		
03/15/2006	1782	MOTION for Reconsideration re 1698 Order *Dismissing the Janus Parent Investor Class Action, or Alternatively For Leave to Replead* by First Derivative Traders. Responses due by 4/3/2006 (Press, Ira) (Entered: 03/15/2006)
* * *		

05/31/2006	2026	ORDER re: Plaintiff's motion for reconsideration or leave to amend in Janus parent investor class. Signed by Judge J. Frederick Motz on 5/31/06(cag, Deputy Clerk)(Entered: 05/31/2006)
* * *		
06/02/2006	2034	AMENDED COMPLAINT against Janus Capital Management LLC, Janus Capital Group Inc., filed by First Derivative Traders.(Press, Ira) (Entered: 06/02/2006)
* * *		
06/30/2006	2095	MOTION to Dismiss *The Second Amended Complaint* by Janus Capital Management LLC, Janus Capital Group Inc.. Responses due by 7/17/2006 (Perry, Mark) (Entered: 06/30/2006)
06/30/2006	2096	Memorandum re 2095 MOTION to Dismiss *The Second Amended Complaint* filed by Janus Capital Management LLC, Janus Capital Group Inc.. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D)(Perry, Mark) (Entered: 06/30/2006)

* * *		
08/04/2006	2133	RESPONSE in Opposition re 2095 MOTION to Dismiss *The Second Amended Complaint Plaintiff's Memorandum Of Law In Opposition To Defendants' Motion To Dismiss The Second Amended Parent Investor Class Complaint* filed by First Derivative Traders. Replies due by 8/18/2006. (Attachments: # 1 Declaration Of Ira M. Press In Opposition To Defendants' Motion To Dismiss The Second Amended Parent Investor Class Complaint# 2 Exhibit A# 3 Exhibit B# 4 Exhibit C# 5 Exhibit D# 6 Exhibit E# 7 Exhibit F# 8 Exhibit G# 9 Exhibit H)(Press, Ira) (Entered: 08/04/2006)
* * *		
08/25/2006	2178	RESPONSE in Support re 2095 MOTION to Dismiss *The Second Amended Complaint The Janus Capital Defendants' Reply Brief in Support of Their Motion to Dismiss the Second Amended Complaint* filed by Janus Capital Management LLC, Janus Capital Group Inc..Replies due by 9/8/2006. (Perry, Mark) (Entered: 08/25/2006)

	* * *	
01/18/2007	2308	Substantive legal issues – addressing (Attachments: # 1 Exhibit Slip Opinion)Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 01/18/2007)
	* * *	
01/22/2007	2310	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Press, Ira) (Entered: 01/22/2007)
	* * *	
01/25/2007	2315	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 01/25/2007)
01/29/2007	2316	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Press, Ira) (Entered: 01/29/2007)
	* * *	

02/20/2007	2331	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 02/20/2007)
	* * *	
02/26/2007	2333	Substantive legal issues – addressing (Attachments: # 1 Exhibit Recent Fourth Circuit Decision)Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 02/26/2007)
02/27/2007	2334	Substantive legal issues – addressing (Attachments: # 1 Exhibit A)Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Press, Ira) (Entered: 02/27/2007)
	* * *	
05/21/2007	2384	OPINION. Signed by Judge J. Frederick Motz on 5/21/07. Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(jnl, Deputy Clerk) (Entered: 05/21/2007)

05/21/2007	2385	ORDER granting (16) Motion to Dismiss in case 1:04-cv-00818-JFM; granting (2095) Motion to Dismiss in case 1:04-md-15863-JFM. Signed by Judge J. Frederick Motz on 5/21/07. Associated Cases: 1:04-md-15863-JFM, 1:04-cv-00818-JFM(jnl, Deputy Clerk) (Entered: 05/21/2007)
	* * *	
06/20/2007	2404	NOTICE OF APPEAL by First Derivative Traders. Appeal Record due by 7/20/2007. (Press, Ira) (Entered: 06/20/2007)
	* * *	
05/07/2009	3201	JUDGMENT of USCA (certified copy) "Reversing" the judgment of the District Court and "Remanding" case to the District Court for further proceedings consistent with the Court's decision as to 2404 Notice of Appeal filed by First Derivative Traders (Attachments: # 1 opinion)(nrm, Deputy Clerk) (Entered: 05/08/2009)
	* * *	

06/02/2009	3218	ORDER of USCA "Denying" the petition for rehearing en banc as to 2404 Notice of Appeal filed by First Derivative Traders (nrm, Deputy Clerk) (Entered: 06/02/2009)
* * *		
06/10/2009	3221	MANDATE of USCA as to 2404 Notice of Appeal filed by First Derivative Traders (nrm, Deputy Clerk) (Entered: 06/11/2009)
* * *		
11/16/2009	3280	ANSWER to Complaint *(Second Amended)* by Janus Capital Management LLC, Janus Capital Group Inc..(Perry, Mark) (Entered: 11/16/2009)
* * *		
12/01/2009	3288	NOTICE by First Derivative Traders *of Plaintiff's First Set of Interrogatories* (Press, Ira) (Entered: 12/01/2009)
* * *		

12/30/2009	3305	RESPONSE re 3288 Notice (Other) *Plaintiffs' First Set of Interrogatories* filed by Janus Capital Group Inc.. (Attachments: # 1 Exhibit Exhibit A to Janus's Response to Plaintiffs' First Set of Interrogatories)(Perry, Mark) (Entered: 12/30/2009)
* * *		
07/06/2010	3377	Correspondence re: stay of pretrial proceedings pending U.S. Supreme Court decision (Perry, Mark) (Entered: 07/06/2010)
* * *		

U.S. District Court
District of Maryland (Baltimore)
CIVIL DOCKET FOR CASE #:
1:04-cv-00818-JFM

Wiggins v. Janus Capital Group Inc. et al
Assigned to: Judge J. Frederick Motz
Lead case: 1:04-md-15863-JFM
Member case: (View Member Case)
Case in other court: USDC-District of Colorado(Denver), 03-CV-2403

Date Filed: 04/05/2004
Jury Demand: Plaintiff

Date Filed	#	Docket Text
04/05/2004	1	Case Transferred from USDC–District of Colorado (Denver); certified copy of the transfer order and docket sheet received; documents 1 through 13 retained in USDC–District of Colorado (Denver). (ljs, Deputy Clerk) (Entered: 04/06/2004)
* * *		

09/30/2004	3	AMENDED COMPLAINT against Janus Capital Management LLC, Janus Capital Group Inc., filed by First Derivative Traders. (Attachments: # 1 Exhibit Notice)(Press, Ira) (Entered: 09/30/2004)
		* * *
03/01/2006	5	ORDER in Janus subtrack JFM-04-818 re: Motion to dismiss Janus Parent Investor Class Action. Signed by Judge J. Frederick Motz on 2/27/06. (jnl, Deputy Clerk) (Entered: 03/01/2006)
03/15/2006	6	MOTION for Reconsideration re 5 Order *Dismissing the Janus Parent Investor Class Action, or Alternatively For Leave to Replead* by First Derivative Traders. Responses due by 4/3/2006 (Press, Ira) (Entered: 03/15/2006)
		* * *
06/02/2006	13	AMENDED COMPLAINT against Janus Capital Management LLC, Janus Capital Group Inc., filed by First Derivative Traders.(Press, Ira) (Entered: 06/02/2006)

	* * *	
06/30/2006	16	MOTION to Dismiss *The Second Amended Complaint* by Janus Capital Management LLC, Janus Capital Group Inc.. Responses due by 7/17/2006 (Perry, Mark) (Entered: 06/30/2006)
06/30/2006	17	Memorandum re 16 MOTION to Dismiss *The Second Amended Complaint* filed by Janus Capital Management LLC, Janus Capital Group Inc.. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D)(Perry, Mark) (Entered: 06/30/2006)
08/25/2006	18	RESPONSE in Support re 16 MOTION to Dismiss *The Second Amended Complaint The Janus Capital Defendants' Reply Brief in Support of Their Motion to Dismiss the Second Amended Complaint* filed by Janus Capital Management LLC, Janus Capital Group Inc..Replies due by 9/8/2006. (Perry, Mark) (Entered: 08/25/2006)
	* * *	

01/18/2007	21	Substantive legal issues – addressing (Attachments: # 1 Exhibit Slip Opinion)Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 01/18/2007)
01/22/2007	22	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Press, Ira) (Entered: 01/22/2007)
01/25/2007	23	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 01/25/2007)
01/29/2007	24	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Press, Ira) (Entered: 01/29/2007)
* * *		
02/20/2007	26	Substantive legal issues – addressing Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 02/20/2007)

02/26/2007	27	Substantive legal issues – addressing (Attachments: # 1 Exhibit Recent Fourth Circuit Decision)Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Perry, Mark) (Entered: 02/26/2007)
02/27/2007	28	Substantive legal issues – addressing (Attachments: # 1 Exhibit A)Associated Cases: 1:04–md–15863–JFM, 1:04–cv–00818–JFM(Press, Ira) (Entered: 02/27/2007)
* * *		
03/06/2007		Motion Hearing held on 3/6/2007 re 6 MOTION for Reconsideration re 5 Order *Dismissing the Janus Parent Investor Class Action, or Alternatively For Leave to Replead* filed by First Derivative Traders, 29 MOTION to Stay filed by Banc of America Securities LLC, 16 MOTION to Dismiss *The Second Amended Complaint* filed by Janus Capital Management LLC, Janus Capital Group Inc. held before Judge J. Frederick Motz – ARGUED – held subcuria (Court Reporter M. Zajac) (bma, CRD) (Entered: 03/06/2007)

05/21/2007	30	OPINION. Signed by Judge J. Frederick Motz on 5/21/07. Associated Cases: 1:04-md-15863-JFM, 1:04-cv-00818-JFM(jnl, Deputy Clerk) (Entered: 05/21/2007)
05/21/2007	31	ORDER granting (16) Motion to Dismiss in case 1:04-cv-00818-JFM; granting (2095) Motion to Dismiss in case 1:04-md-15863-JFM. Signed by Judge J. Frederick Motz on 5/21/07. Associated Cases: 1:04-md-15863-JFM, 1:04-cv-00818-JFM(jnl, Deputy Clerk) (Entered: 05/21/2007)
06/19/2007	32	NOTICE OF APPEAL by First Derivative Traders. Filing fee $ 455, receipt number 1422584. Appeal Record due by 7/19/2007. (Press, Ira) (Entered: 06/19/2007)
* * *		

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 03-D-2403 (BNR)

CRAIG WIGGINS, individually, and
On Behalf Of All Others Similarly Situated,

Plaintiff,

vs.

JANUS CAPITAL GROUP, INC. (f/k/a Stilwell
SECURITIES LAWS Financial Inc.),
MARK B. WHISTON, LOREN M. STARR,
and GREGORY A. FROST

Defendants.

CLASS ACTION COMPLAINT FOR
VIOLATION OF FEDERAL SECURITIES LAWS

Plaintiff, Craig Wiggins ("Plaintiff"), individually and on behalf of, all other persons similarly situated, by his undersigned attorneys, for his complaint against defendants, alleges the following based upon personal knowledge as to himself and his own acts, and information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through his attorneys, which included, among other things, a review of the defendants' public documents, conference calls and announcements made by defendants, United States Securities and

Exchange Commission ("SEC") filings, wire and press releases published by and regarding Stilwell Financial, Inc. and Capital Group, Inc. (collectively "Janus" or the "Company"), and information readily obtainable on the Internet. Plaintiff believes that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This is a federal Class Action brought by the Plaintiff on behalf of himself and a Class consisting of all other persons who purchased or otherwise acquired the publicly traded securities of Janus Capital Group, Inc. (f/k/a/ Stilwell Financial Inc., NYSE: SV) (NYSE: JNS), between July 21, 2000 and September 2, 2003, inclusive (the "Class Period"), seeking to recover damages caused by Defendants' violations of federal securities laws and pursue remedies under the Securities Exchange Act of 1934 (the "Exchange Act").

JURISDICTION AND VENUE

2. The claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act, (15 U.S.C. §§ 78j(b) and 78t(a)), and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5).

3. This Court has jurisdiction over the subject matter of this action pursuant to §27 of the Exchange Act (15 U.S.C. §78aa) and 28 U.S.C. § 1331.

4. Venue is proper in this Judicial District pursuant to §27 of the Exchange Act, 15 U.S.C. § 78aa and 28 U.S.C. § 1391(b). Many of the acts and transactions alleged herein, including the preparation and dissemination of materially false and misleading information, occurred in substantial part in

this District. Additionally, the Company maintains its principal executive offices in this Judicial District.

5. In connection with the acts, conduct and other wrongs alleged in this complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to, the United States mails, interstate telephone communications and the facilities of the national securities exchange.

THE PARTIES

6. Plaintiff, Craig Wiggins, purchased Janus securities, as set forth in the accompanying certification attached hereto as Exhibit A and incorporated herein by reference, and has suffered damages as a result of the wrongful acts of defendants as alleged herein.

7. Janus is a corporation organized and existing under the laws of Delaware with its principal place of business located within this judicial district at 100 Fillmore Street, Denver, Colorado 80206.

8. Defendant Mark B. Whiston ("Whiston") is the Chief Executive Officer, Vice-Chairman of the Board, President, and Director of Janus.

9. Defendant Loren M. Starr ("Starr") is the Vice President and Chief Financial Officer of Janus.

10. Defendant Gregory A. Frost ("Frost") is the Vice President and Controller of Janus.

11. Defendants Whiston, Starr, and Frost are collectively referred to hereafter as the "Individual Defendants." During the Class Period, each of the Individual Defendants, as senior executive officers and/or, directors of Janus, were privy to non-public information concerning its business, finances, prod-

ucts, markets and present and future business prospects via access to internal corporate documents, conversations and connections with other corporate officers and employees, attendance at management and Board of Directors meetings and committees thereof and via reports and other information provided to them in connection therewith. Because of their possession of such information, the Individual Defendants knew or recklessly disregarded the fact that adverse facts specified herein had not been disclosed to, and were being concealed from, the investing public.

12. Each of the Individual Defendants are liable as a direct participant with respect to a fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of Janus publicly traded securities by disseminating materially false and misleading statements and/or concealing material adverse facts. The scheme deceived the investing public regarding Janus' business, operations, management, and the intrinsic value of Janus publicly traded securities and caused Plaintiff and other members of the Class to purchase Janus securities at artificially inflated prices.

13. In addition, the Individual Defendants, by reason of their status as senior executive officers and directors were each a "controlling person" within the meaning of Section 20 of the Exchange Act and had the power and influence to cause the Company to engage in the unlawful conduct complained of herein. Because of their positions of control, the Individual Defendants were able to and did, directly or indirectly, control the content of various SEC filings, press releases, and other public statements pertaining to the Company during the Class Period.

14. The Individual Defendants, because of their positions with Janus were provided with copies of Janus' reports and press releases alleged herein to be misleading, prior to or shortly after their issuance and had both the ability and opportunity to prevent their issuance or cause them to be corrected. The Individual Defendants had the opportunity to commit the fraudulent acts alleged herein. Accordingly, each of the Individual Defendants is responsible for the accuracy of the public reports arid releases detailed herein and is therefore primarily liable for the representations contained therein.

15. The Individual Defendants are liable, jointly and severally, as direct participants in and co conspirators of, the wrongs complained of herein.

CLASS ACTION ALLEGATIONS

16. Plaintiff brings this action as a federal class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of a class (the "Class"), consisting of all those who purchased the securities of Janus between July 21, 2000 and September 2, 2003, inclusive, (the "Class Period") and who were damaged thereby. Excluded from the Class are defendants, the officers and directors of the Company, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

17. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, Janus securities were actively traded on the New York Stock Exchange ("NYSE"). While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff

believes that there are hundreds or thousands of members in the proposed Class.

18. Plaintiff's claims are typical of the claims of the members of the Class, because plaintiffs and all of the Class members sustained damages arising out of defendants' wrongful conduct complained of herein.

19. Plaintiff will fairly and adequately protect the interests of the Class members and has retained counsel who are experienced and competent in class actions and securities litigation.

20. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. Furthermore, as the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it impossible for the members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

21. Questions of law and fact common to the members of the Class predominate over any questions that may affect only individual members, in that defendants have acted on grounds generally applicable to the entire Class. Among the questions of law and fact common to the Class are:

(a) Whether the federal securities laws were violated by Defendants' acts as alleged herein;

(b) Whether the Company's publicly disseminated press releases and statements during the Class Period omitted and/or misrepresented material facts;

(c) Whether defendants breached any duty to convey material facts or to correct material acts previously disseminated;

(d) Whether the defendants acted willfully, with knowledge or recklessly, in omitting and/or misrepresenting material facts; and

(e) Whether the members of the Class have sustained damages and, if so, what is the appropriate measure of damages.

SUBSTANTIVE ALLEGATIONS

Background

22. On September 3, 2002, Stilwell Financial Inc. ("Stilwell") announced that it planned to merge its operations into a unified organization that would market and distribute its investment products globally under the Janus brand name. Headquartered in Denver, the new organization would be created by merging Janus Capital Corporation into Stilwell and would be named Janus Capital Management Inc. The merger was completed by December 31, 2002.

23. Janus Capital Group Inc., formerly Stilwell, sponsors, markets and provides investment advisory, distribution and administrative services, primarily to mutual funds, in both domestic and international markets.

24. This class action concerns Janus' illegal scheme of entering into agreements with "special" investors who were permitted to "time" its Janus family of mutual funds in return for money also known as "sticky assets." "Timing" is a strategy that uses short in-and-out trades and works only because some funds use "stale" prices to calculate the value of securities held in the fund's portfolio. These prices

are "stale" because they do not necessarily reflect the "fair value" of such securities as of the time the Net Asset Value ("NAV") is calculated.

25. As a result of this undisclosed illegal scheme, Janus was able to inflate its financial results throughout the Class Period. More specifically, Janus failed to disclose and/or misrepresented the following adverse facts, among others: (1) that its wholly-owned subsidiary Janus Capital Corp. ("JCC") entered into an illegal agreement with Edward Stein, Canary Capital Partners, LLC, and Canary Investment Management, LLC (collectively "Canary") wherein JCC permitted Canary to time Janus mutual funds; (2) that in exchange for permitting Canary to time James mutual funds, Canary deposited "sticky assets" into certain Janus money markets funds; (3) that the "sticky assets" deposited into certain Janus money market funds permitted Janus to materially overstate its assets under management and thus permitted Janus to receive a steady flow of fees from such "sticky assets;" and (4) as a result of this illegal scheme, Janus, throughout the Class Period, materially overstated and artificially inflated Janus' earnings, income, and earning per share.

Materially False and Misleading Statements Made During the Class Period

26. The Class Period begins on July 21, 2000. At that time, the Company, then Stilwell Financial, issued a press release announcing its financial results for the second quarter 2000. The Company reported second quarter 2000 net income of $151.7 million, or 64¢ per diluted share, compared to $70.9 million, or 30¢ per diluted share, in second quarter 1999. For the six months ended June 30, 2000, Stil-

well reported net income of $293.7 million, or $1.25 per diluted share, compared to $131.9 million, or 56¢ per diluted share, for the same 1999 period.

27. On August 14, 2000, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

28. On October 26, 2000, the Company issued a press release to announce its financial results for the third quarter of 2000. Therein, the Company reported second quarter 2000 net income of $170.1 million, or 73¢ per diluted share, compared to $82.7 million, or 36¢ per diluted share, in the third quarter 1999. For the nine months ended September 30, 2000, Stilwell reported net income of $510.5 million, or $2.23 per diluted share, compared to $214.6 million, or 95¢ per diluted share, for the same 1999 period. Average assets under management in the third quarter were $324.2 billion, a 97% increase from the same period in 1999. Since September 30, 1999, the substantial growth in assets under management has resulted in an increase in revenues from $311.2 million to $609.5 million.

29. On November 14, 2000, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

30. On January 30, 2001, the Company announced its financial results for the fourth quarter and year-end 2000. At that time, Stilwell reported net income of $153.2 million, or 66¢ per diluted share, during the fourth quarter 2000 compared with net income of $98.5 million, or 43¢ per diluted share, in the fourth quarter 1999. For the full year 2000, Stilwell's net income was $663.7 million, or $2.90 per

diluted share, compared with $313.1 million, or $1.38 per diluted share, for the same period in 1999. Exclusive of certain nonrecurring items during 2000, net income for 2000 totaled $610.8 million, or $2.67 per diluted share. Additionally, the Company reported:

Fourth Quarter 2000 vs. Fourth Quarter 1999

Stilwell, which includes Janus, Berger LLC, Nelson Money Managers Plc and an approximate 33% equity investment in DST, reported $257.8 billion in assets under management as of December 31, 2000 compared to$257.4 billion as of December 31, 1999. Average assets under management totaled $284.7 billion during fourth quarter 2000 compared to $208.5 billion in prior year's fourth quarter, $324.2 billion in third quarter 2000 and $304.2 billion in second quarter 2000. For the quarter, market depreciation of $57.0 billion and slight net cash outflows (less than $1 billion) resulted in an 18% decline in assets under management. This decline in assets under management generally reflected the net effect to the Company of the widely varied fourth quarter 2000 results for the key market indexes (e.g., an approximately 33% decline in the Nasdaq, an 8% decline in the Russell 2000, a 1% increase in the Dow Jones Industrial Average). Shareowner accounts increased by approximately two million compared to December 31, 1999 and totaled approximately 6.3 million as of December 31, 2000.

Operating margins improved in fourth quarter 2000 versus the comparable 1999 period. This improvement is attributable to the 38% increase in revenues, as well as continued success in maintaining an efficient cost structure. Operating expenses of $287.3 million for fourth quarter 2000 exceeded comparable 1999 by $74.5 million, or 35%, but were 9% below third quarter 2000 expenses. The increase in expenses over prior year occurred in the following key categories: i) compensation, primarily related to an increase in the number of employees; ii) third party concession fees resulting from, a higher level of assets under management through these distribution arrangements; iii) depreciation and amortization arising from Janus' infrastructure enhancement efforts over the last two years and deferred commission payments in connection with the growth in the Janus World Funds Plc; and iv) professional services fees associated with ongoing web development and maintenance efforts.

Full Year 2000 vs. Full Year 1999

For the year ended December 31, 2000, net cash inflows of assets totaled $68.4 billion (of which Janus contributed $66.9 billion). This industry-leading total was substantially offset by market depreciation of $68.0 billion. Average assets under management increased $137.7 billion, or 84%, compared to the average for the year ended December 31, 1999, resulting in a more than $1 billion improvement in revenues.

> Operating margins improved from 42.8% to 46.1% year to year, mirroring the strong improvement quarter to quarter. Higher operating expenses were evident in the same cost components noted in the quarterly discussion above. Compensation and third party concession costs were approximately 36% of total revenues during the year ended December 31, 2000 compared to approximately 38% in 1999. With numerous infrastructure enhancements completed throughout 1999 and 2000 and a 132% increase in deferred commission payments resulting from the growth of Janus' offshore funds, depreciation and amortization grew nearly 130% in 2000 versus 1999. The rapid increase in assets under management during the first half of the year generated significant shareowner activity, thereby requiring substantial temporary employee help, which is recorded as professional services fees. The rate of increase in the remaining operating expenses on a combined basis (approximately 51%) continues to trail the rate of revenue growth, thereby contributing to Stilwell's competitive operating margins.

31. Commenting on these results, Landon H. Rowland, Stilwell's Chairman, President and Chief Executive Officer stated:

> We are pleased to report Stilwell's record quarterly and full year earnings. For the year, Stilwell's revenues, operating income and net income each grew by more than 85% compared to 1999. These results demonstrate the fantastic achievements of our sub-

sidiaries and highlight the ongoing efforts, diligence and dedication of their management teams.

Movements in Stilwell's assets under management during the fourth quarter generally followed the markets, with market depreciation comprising virtually the entire decline in assets during the quarter. While net flows of cash were essentially flat during fourth quarter, the $68.4 billion in net inflows for the year were best in the mutual fund industry. During 2000, Janus closed five funds – including its flagship Janus Fund -- with the objective of ensuring ongoing success for existing fund shareowners. These funds totaled nearly 50% of Janus' total assets under management. We are also pleased with the ability of the subsidiaries to develop alternative distribution and service options for shareholders and the contributions of these actions to year-end results.

We believe Stilwell is well-positioned to build on the momentum generated during 1999 and 2000. Each of Stilwell's investments -- Janus, Berger, Nelson and DST -- continues to develop and promote its brand name and its comparative advantages. During the third and fourth quarters of 2000, as part of Stilwell's $1 billion stock repurchase program, the Company repurchased more than 7 million shares of its common stock through open market transactions. We believe that this investment, much like the investment in our various subsidiaries and affiliates, will prove to be value-enhancing to our existing

shareholders. Additionally, we believe the purchase of Janus stock from Tom Bailey will provide an outstanding opportunity to enhance the management incentives at Janus.

32. On March 20, 2001, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

33. On April 23, 2001, the Company, issued a press release announcing its financial results for the first quarter 2001. At that time, the Company reported first quarter 2001 net income of $111.4 million, or 48¢ per diluted share, compared to $188.7 million, or 84¢ per diluted share, in first quarter 2000. Average assets under management in the first quarter were $246.6 billion, 16% decrease from the same period in 2000.

34. On May 15, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial, results.

35. On July 25, 2001, the Company issued a press release announcing its financial results for the second quarter 2001. At that time, the Company reported second quarter 2001 net income of $104.5 million, or 46¢ per diluted share, compared to $150.8 million, or 66¢ per diluted share, in second quarter 2000. For the six months ended June 30, 2001, Stilwell reported net income of $216.4 million, or 94¢ per diluted share, compared to $293.7 million, or $1.29 per diluted share, for the same 2000 period. Average assets under management in the second quarter were $223.9 billion, a 26% decrease from the same period in 2000.

36. On August 14, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

37. On October 24, 2001, the Company issued a press release announcing its financial results for the third quarter 2001. At that time, the Company reported third quarter 2001 net income of $90.5 million, or 39¢ per diluted share, compared to $170.1 million, or 73¢ per diluted share, in third quarter 2000. For the nine months ended September 30, 2001, Stilwell reported net income of $306.9 million, or $1.33 per diluted share, compared to $463.8 million, or $2.02 per diluted share, for the same period in 2000.

38. On November 14, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

39. On January 30, 2002, the Company announced its financial results for the fourth quarter and year-end 2001. At that time, Stilwell reported net income of $84 million, or 37¢ per diluted share, during the fourth quarter 2001 compared with net income of $147 million, or 64¢ per diluted share, in the fourth quarter 2000. For the full year 2001, Stilwell's net income was $390.9 million, or $1.70 per diluted share, compared with $610.8 million, or $2.67 per diluted share, for the same period in 2000. Additionally, the Company reported:

> Average assets under management totaled $186.3 billion during fourth quarter 2001, compared to $198.0 billion in third quarter 2001 and $284.7 billion in fourth quarter 2000. The lower level of average assets un-

der management in fourth quarter 2001 versus 2000 resulted in a 37 percent decrease in revenues quarter-to-quarter (to $334.1 million from $530.5 million).

During the year ended December 31, 2001, assets under management declined $65.6 billion (from $257.8 billion to $192.2 billion), of which approximately 92 percent was attributable to market depreciation. Average assets under management during the year ended December 31, 2001, totaled $213.5 billion, compared to $301.9 billion in 2000, resulting in a decrease in revenues from $2,248.1 million in 2000 to $1,555.7 million in 2001. With lower revenues and the expected margin pressures noted in the fourth-quarter discussion, Stilwell reported a 41 percent decline in ongoing operating income in 2001 versus 2000.

40. Commenting on these results, Landon H. Rowland, Stilwell's Chairman, President and Chief Executive Officer stated:

The company's impressive EBITDA margins reflect the benefit of Stilwell's $1.5 billion additional investment in Janus during 2001, as well as the strong operating margins achieved at Janus through aggressive cost controls. We believe these margins are a strong indicator of the financial strength and value of our company.

Stilwell reported an ongoing operating margin of 38.9 percent in fourth quarter 2001 and 39.4 percent for full year 2001. The company's ability to maintain these margins is indicative of the variability in the Janus

business model and the savings generated from its emphasis on electronic shareowner servicing. Excluding the amortization expense associated with the company's additional investments in Janus during the year, the ongoing operating margin for the three months and year ended December 31, 2001, was 43.6 percent and 41.8 percent, respectively,

As we move into 2002, each of our core organizations provides opportunities to add shareholder value. Janus is poised to regain momentum through efforts to improve investment performance, its strategic diversification of distribution channels and quality brand name. Berger, through the acquisitions of Bay Isle and INTECH, has strengthened its franchise and established a well-rounded foundation for growth. Nelson continues its steady growth through development of a multi-tiered savings gateway for employees throughout the United Kingdom. These subsidiaries, together with the consistently strong earnings growth at DST, provide the foundation for Stilwell's future.

41. On March 20, 2002, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

42. On April 25, 2002, the Company, issued a press release announcing its financial results for the first quarter 2002. At that time, the Company reported first quarter 2002 net income of $97.2 million, or 42¢ per diluted share, compared to $111.4 million, or 48¢ per diluted share, in first quarter 2001. Aver-

age assets under management in the first quarter were $188.8 billion, and 27% decrease from the same period in 2000.

43. On May 15, 2002, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

44. On July 25, 2002, the Company issued a press release announcing its financial results for the second quarter of 2002. At that time, the Company reported second quarter 2002 net income or $73.7 million, or 30¢ per diluted share, compared to $90.4 million, or 39¢ per diluted share, in second quarter 2001. For the six months ended June 30, 2002, Stilwell reported net income of $170.9 million, or 72¢ per diluted share, compared to $201.8 million, or 88¢ per diluted share, for the same 2001 period.

45. On August 14, 2002, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

46. As stated previously, on September 3, 2002, Stilwell announced that it would merge its operations into a unified organization that would market and distribute its investment products globally under the Janus brand name. Additionally, Stilwell stated that Janus would be led by defendant Whiston, who would become chief executive officer on December 31, 2002, the expected date of the merger. An 11-year Janus veteran, Whiston served as president of retail and institutional services. As part of the merger, Janus would be responsible for the strategic direction of Stilwell's investment management subsidiaries. These subsidiaries include Janus Capitol Management LLC; Berger Financial Group LLC,

which owns Enhanced Investment Technologies LLC ("INTECH") and Bay Isle Financial LLC; and U.K.-based Nelson Money Managers plc. Collectively, these firms manage approximately $150 billion in assets.

47. On October 30, 2002, the Company issued a press release to announce its financial results for the third quarter of 2002. Therein, the Company reported a net loss of $131.2 million, or (60¢) per diluted share, during third quarter 2002 compared to net income of $20.8 million, or 11¢ per diluted share, in third quarter 2001. For the nine months ended September 30, 2002, Stilwell's net income was $39.7 million, or 12¢ per diluted share, compared to $228.0 million, or 99¢ per diluted share, for the same 2001 period.

48. On November 14, 2002, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

49. On January 2, 2003, Janus announced that following the merger of Janus Capital Corporation and Stilwell Financial Inc., which became effective on January 1, 2003, shares of the new organization – Janus Capital Group Inc. – began trading on the New York Stock Exchange under the ticker symbol JNS.

50. On January 30, 2003, Janus announced its financial results for the fourth quarter and year-end 2002. At this time, Janus reported net income of $45.0 million, or $0.18 per diluted share, during the fourth quarter 2002 compared with net income of $73.7 million, or $0.32 per diluted share, in the fourth quarter 2001. For the full year 2002, Janus' net income was $84.7 million, or $0.31 per diluted

share, compared with $302.3 million, or $1.31 per diluted share, for the same period in 2001. The Company's 2002 earnings reflect decreased average assets under management as well as the effects of significant non-recurring items reported in the third quarter 2002. Excluding these non-recurring items, net income for 2002 totaled $244.0 million, or $1.02 per diluted share, compared with $390.9 million, or $1.70 per diluted share in 2001. Additionally, the Company reported:

Fourth Quarter 2002 vs. Fourth Quarter 2001

Janus Capital Group ended the year reporting assets under management of $138 billion, compared with $140 billion as of September 30, 2002 and $193 billion as of December 31, 2001. Assets under management include assets from Janus' investment management subsidiaries: Janus Capital Management LLC; Berger Financial Group LLC, which owns Enhanced Investment Technologies, LLC (INTECH) and Bay Isle Financial LLC; and Nelson Money Managers plc. The total also includes the small-and mid-cap value assets that Perkins, Wolf, McDonnell and Company manages for Berger retail and institutional shareholders. The slight decrease in assets during the quarter reflected market appreciation of $3 billion offset by net redemptions of $5 billion.

Full Year 2002 vs. Full Year 2001

During the year ended December 31, 2002, assets under management decreased $54 billion – from $192 billion to $138 billion. This decline reflected market depreciation of $42

billion, net outflows of $18 billion and increased assets of $6 billion from Berger's acquisition of INTECH. Average assets under management in 2002 declined 23% to $164 billion from $214 billion in 2001. These lower average assets under management led to a 26% decrease in annual revenue – from $1.5 billion to $1.1 billion.

51. Commenting on these results, defendant Whiston stated:

> Today's financial results reflect the challenging environment for growth-oriented investment managers, but I'm confident that we're taking the necessary steps to ensure that Janus is well positioned for future growth[.] . . . Since we merged Janus and Stilwell, we've made remarkable progress in a very short time.
>
> Earlier this month, Janus introduced seven new value funds and risk-managed equity products to complement its growth-oriented lineup.
>
> Broadening our product offerings is an important step toward improving our top-line growth[.] . . . We're also focused on controlling costs to manage our business as efficiently as possible.
>
> Nothing is more important to me than improving performance, and we saw signs last year that the steps we're taking to that end are paying off[.] . . . Our improved relative performance and the results from our more conservative products were bright spots in 2002.

> Our focus in 2003 will be to continue improving performance, while leveraging Janus' global distribution network and managing our expenses[.]

52. On March 28, 2003, the Company filed its annual report with the SEC on Form 10-K. The Company's Form 10-K was signed by defendants Whiston, Starr, and Frost. Therein, the Company reaffirmed its previously announced results.

53. On April 29, 2003, Janus announced, via a press release, its financial results for the first quarter of 2003. Therein, Janus reported net income of $38.6 million, or $0.17 per diluted share, during the first quarter 2003 compared with $45.0 million, or $0.20 per diluted share in the preceding quarter, and $97.2 million, or $0.42 per diluted share in the first quarter of 2002. Average assets under management in the first quarter 2003 totaled $136.4 billion, a 4.7% decrease from the fourth quarter of 2002, and a 26.9% decline from the first quarter of 2002. Average assets under management in the fourth quarter 2002 were $143 billion, a 23% decline from the same period in 2001. This lower level of average assets under management caused the company's revenues to drop 26% – to $248.3 million – from $334.1 million in the fourth quarter of 2001.

54. On May 15, 2003, the Company filed its quarterly report with the SEC on Form 10-Q, The Company's Form 10-Q was signed by defendants Whiston, Starr, and Frost. Therein, the Company reaffirmed its previously announced results.

55. On July 30, 2003, Janus issued a press release to announce its financial results for the second quarter of 2003. Therein, Janus reported net income of $47.5 million, or $0.21 per diluted share, on reve-

nues of $250.6 million for the quarter ended June 30, 2003. The firm reported net income of $73.7 million, or $0.33 per diluted share, on revenues of $310.4 million in the comparable 2002 quarter. In the first quarter of 2003, net income was $38.6 million, or $0.17 per diluted share, on revenues of $235.5 million. Assets under management at June 30, 2003 totaled $149.8 billion, an increase of $17.1 billion, or 12.9% from the $132.7 billion reported at March 31, 2003, due to $16 billion in net inflows combined with $15.5 billion of market appreciation. Of the $1.6 billion in net inflows, $0.2 billion were long-term assets and $1.4 billion came from money markets.

56. On August 12, 2003, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q was signed by defendants Whiston, Starr, and Frost. Therein, the Company reaffirmed its previously announced results.

57. The statements referenced above in ¶¶ 26-56 were each materially false and misleading because they failed to disclose and/or misrepresented the following adverse facts, among others: (1) that its wholly-owned subsidiary JCC entered into an illegal agreement with Edward Stein, Canary Capital Partners, LLC, and Canary investment Management, LLC (collectively "Canary") wherein JCC permitted Canary to time Janus mutual funds; (2) that in exchange for permitting Canary to time Janus mutual funds, Canary deposited "sticky assets" into certain Janus money markets funds; (3) that the "sticky assets" deposited into certain Janus money market funds permitted Janus to materially overstate its assets under management and thus permitted Janus to receive a steady flow of fees from such "sticky assets;" and (4) as a result of this illegal

scheme, Janus, throughout the Class Period, materially overstated and artificially inflated Janus' earnings, income, and earning per share.

THE TRUTH BEGINS TO EMERGE

58. On September 3, 2003, New York Attorney General Eliot Spitzer, filed a complaint in New York Supreme Court that exposed the fraudulent and manipulative practices that occurred at mutual fund companies (the "Spitzer Complaint"), charging Canary with fraud in connection with the unlawful practices alleged herein and exposing the fraudulent and manipulative practices charged here with the particularity that had resulted from a full- scale confidential investigation.

59. The Spitzer Complaint, alleged, with regard to Janus, as follows, among other things:

> In or about April, 2002, Janus granted permission for Canary to time the Janus Mercury fund. In exchange, Canary deposited "sticky" money into a Janus money market fund. Canary timed the Janus Mercury fund during 2002 and 2003. Canary also received capacity to time the Janus High Yield fund.
>
> In early 2003, Canary sought timing capacity in Janus' offshore funds. Through an intermediary, it contacted Janus and offered "sticky" assets in exchange for this additional timing capacity. In response, a concerned Janus employee sent e-mails to Richard Garland, the CEO of Janus International, expressing alarm over the volume of market timing activity in Janus Mutual Funds:
>
> I'm getting more concerned w/ all of these market timers and how they arc affecting our

> PM's [i.e., Portfolio Managers] trading activity. [Portfolio Managers] have voiced their sensitivity on a number of occasions re: this type of activity in JWF. I spoke to [a Janus employee] and confirmed that this is a big problem domestically and want to avoid this at all cost before it gets too problematic offshore. Now that we have our exchange limitation in our prospectus, I would feel more comfortable not accepting this type of business because its too difficult to monitor/enforce & it is very disruptive to the PM's & operation of the funds. Obviously, your call from the sales side.
>
> [A] Janus employee also recommended to Garland that Janus refuse the additional business from Canary due to the issues created for portfolio managers: "For now, I don't think we should take-on additional business of this nature. . . .We need to keep our Funds clean & minimise [sic] issues for PM's/fund performance. Do you agree?"
>
> Garland did not agree. He replied: "I have no interest in building a business around market timers, but at the same time **I do not want to turn away $10-$20m!** How big is the [Canary] deal . . . ?" After learning that Canary's timing could amount to between **$10 and $50 million dollars**, Garland gave the "[g]o ahead" for Canary's additional timing capacity on April 3, 2003.

(Emphasis added).

60. Additionally, the Spitzer Complaint alleged:

Managing the extensive timing activity in its funds became difficult for Janus. In early June, 2003, it began to consider adopting a consistent policy on market timing. Discussion concerning development of such a policy was opened up to certain Janus employees. Comments included:

- ***"Our stated policy is that we do not tolerate timers. As such, we won't actively seek timers, but when pressed and when we believe allowing a limited/controlled amount of timing activity will be in JCG's best interests (increased profitability to the firm) we will make exceptions under these parameters."*** (JCG 000605)

- "My own personal recommendation is not to allow timing, period, and follow the prospectus. . . . [T]imers often hide multiple accounts and move on the same day which could hurt other investors and enrage the Pms. . . . I don't think the static assets that we might be able to hold onto are worth the potential headaches, nor does this fall into our 'narrow and deep' focus. ***I suggest we maintain the timing agreements we have, but allow no more."*** (JCG 000569-570)

- ***"[I]f we are going to allow timing, we want to be sure that there are enough static assets [i.e., "sticky" assets/ so that we are making*** a decent profit for all the trouble we are put through." (JCG 000569).

(Emphasis added).

61. Market reaction to this news was swift. Shares of Janus fell 5.4 percent or $0.98 per share to close at $16.88 per share on September 3, 2003. Additionally, on September 4, 2003, Shares of Janus fell another 7.5% or $1.28 per share to close at $15.60 per share.

62. Since the news of Janus' illegal arrangement with Canary and other special investors was revealed, Janus funds have seen investors redeem $2.4 billion in withdrawals.

UNDISCLOSED ADVERSE INFORMATION

63. The market for Janus' publicly traded securities was open, well-developed and efficient at all relevant times. As a result of these materially false and misleading statements and failures to disclose, Janus' publicly traded securities traded at artificially inflated prices during the Class Period. Plaintiff and other members of the Class purchased or otherwise acquired Janus publicly traded securities relying upon the integrity of the market price of Janus' publicly traded securities and market information relating to Janus, and have been damaged thereby.

64. During the Class Period, defendants materially misled the investing public, thereby inflating the price of Janus' publicly traded securities, by publicly issuing false and misleading statements and omitting to disclose material facts necessary to make defendants' statements, as set forth herein, not false and misleading. Said statements and omissions were materially false and misleading in that they failed to disclose material adverse information and misrepresented the truth about the Company, its business and operations, as alleged herein.

65. At all relevant times, the material misrepresentations and omissions particularized in this Complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by plaintiff and other members of the Class. As described herein, during the Class Period, defendants made or caused to be made a series of materially false or misleading statements about Janus' business, prospects and operations. These material misstatements and omissions had the cause and effect of creating in the market all unrealistically positive assessment of Janus and its business, prospects and operations, thus causing the Company's publicly traded securities to be overvalued and artificially inflated at all relevant times. Defendants' materially false and misleading statements during the Class Period resulted in plaintiff and other members of the Class purchasing the Company's publicly traded securities at artificially inflated prices, thus causing the damages complained of herein.

ADDITIONAL SCIENTER ALLEGATIONS

66. As alleged herein, defendants acted with scienter in that defendants knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, defendants, by virtue of their receipt of information reflecting the true facts regarding Janus, their control over, and/or receipt and/or modification of Janus' allegedly materially misleading

misstatements and/or their associations with the Company which made them privy to confidential proprietary information concerning Janus, participated in the fraudulent scheme alleged herein.

67. Defendants knew and/or recklessly disregarded the falsity and misleading nature of the information which they caused to be disseminated to the investing public. The ongoing fraudulent scheme described in this complaint could not have been perpetrated over a substantial period of time, as has occurred, without the knowledge and complicity of the personnel at the highest level of the Company, including the Individual Defendants.

Applicability Of Presumption Of Reliance: Fraud-On-The-Market Doctrine

68. At all relevant times, the market for Janus' publicly traded securities was an efficient market for the following reasons, among others;

(a) Janus' stock met the requirements for listing, and was listed and actively traded on the NYSE, a highly efficient and automated market;

(b) As a regulated issuer, Janus filed periodic public reports with the SEC and the NYSE;

(c) Janus regularly communicated with public investors via established market communication mechanisms, including through regular disseminations of press releases on the national circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services; and

(d) Janus was followed by several securities analysts employed by major brokerage firms who

wrote reports which were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace.

69. As a result of the foregoing, the market for Janus' publicly traded securities promptly digested current information regarding Janus from all publicly available sources and reflected such information in Janus' stock price. Under these circumstances, all purchasers of Janus' publicly traded securities during the Class Period suffered similar injury through their purchase of Janus' publicly traded securities at artificially inflated prices and a presumption of reliance applies.

NO SAFE HARBOR

70. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this complaint. Many of the specific statements pleaded herein were not identified as "forward-looking statements" when made. To the extent there were any forward-looking statements, there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. Alternatively, to the extent that the statutory safe harbor does apply to any forward-looking statements pleaded herein, defendants are liable for those false forward-looking statements because at the time each of those forward-looking statements was made, the particular speaker knew that the particular forward-looking statement was false, and/or the forward-looking statement was authorized and/or approved

by an executive officer of Janus who knew that those statements were false when made.

FIRST CLAIM

Violation Of Section 10(b) Of The Exchange Act And Rule 10b-5 Promulgated Thereunder Against All Defendants

71. Plaintiff repeats and reiterates the allegations set forth above as though fully set forth herein. This claim is asserted against all defendants.

72. During the Class Period, defendant Janus and the Individual Defendants, and each of them, carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: a) deceive the investing public, including plaintiff and other Class members, as alleged herein; b) artificially inflate and maintain the market price of Janus' publicly traded securities; and c) cause plaintiff and other members of the Class to purchase Janus' publicly traded securities at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, defendants Janus and the Individual Defendants, and each of them, took the actions set forth herein.

73. These defendants: a) employed devices, schemes, and artifices to defraud; b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities in an effort to maintain artificially high market prices for Janus' securities in violation of Section 10(b) of the Exchange Act and Rule 10b-5. These defendants are sued either as primary participants in

the wrongful and illegal conduct charged herein. The Individual Defendants are also sued as controlling persons of Janus, as alleged below.

74. In addition to the duties of full disclosure imposed on defendants as a result of their making of affirmative statements and reports, or participation in the making of affirmative statements and reports to the investing public, they each had a duty to promptly disseminate truthful information that would be material, to investors in compliance with the integrated disclosure provisions of the SEC as embodied in SEC Regulation S-X (17 C.F.R. § 210.01 et seq.) and S-K (17 C.F.R. § 229.10 et seq.) and other SEC regulations, including accurate and truthful information with respect to the Company's operations, financial condition and performance so that the market prices of the Company's publicly traded securities would be based on truthful, complete and accurate information.

75. Janus and the Individual Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business, business practices, performance, operations and future prospects of Janus as specified herein.

76. These defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of Janus' value and performance and continued substantial growth, which included the making of, or the participation in the making of, untrue statements of

material facts and omitting to state material facts necessary in order to make the statements made about Janus and its business operations and future prospects in the light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of Janus' securities during the Class Period.

77. Each of the Individual Defendants' primary liability, and controlling person liability, arises from the following facts: a) each of the Individual Defendants was a high-level executive and/or director at the Company during the Class Period; b) each of the Individual Defendants, by virtue of his responsibilities and activities as a senior executive officer and/or director or the Company, was privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; c) the Individual Defendants enjoyed significant personal contact and familiarity with each other and were advised of and had access to other members of the Company's management team, internal reports, and other data and information about the Company's financial condition and performance at all relevant times; and d) the Individual Defendants were aware of the Company's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

78. These defendants had actual knowledge of the misrepresentations and omissions or material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were

available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing Janus' operating condition, business practices and future business prospects from the investing public and supporting the artificially inflated price of its securities. As demonstrated by defendants' overstatements and misstatements of the Company's financial condition and performance throughout the Class Period, the Individual Defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false or misleading.

79. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price of Janus' securities were artificially inflated during the Class Period. In ignorance of the fact that market prices of Janus' publicly traded securities were artificially inflated, and relying directly or indirectly on the false and misleading statements made by defendants, or upon the integrity of the market in which the securities trade, and/or on the absence of material adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, plaintiff and the other members of the Class acquired Janus securities during the Class Period at artificially high prices and were damaged thereby.

80. At the time of said misrepresentations and omissions, plaintiff and other members of the Class

were ignorant of their falsity, and believed them to be true. Had plaintiff and the other members of the Class and the marketplace known of the true performance, business practices, future prospects and intrinsic value of Janus, which were not disclosed by defendants, plaintiff and other members of the Class would not have purchased or otherwise acquired their Janus publicly traded securities during the Class Period, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices which they paid.

81. By virtue of the foregoing, Janus and the Individual Defendants have each violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

82. As a direct and proximate result of defendants' wrongful conduct, plaintiff and the other members of the Class suffered damages in connection with their respective purchases and sales of the Company's securities during the Class Period.

SECOND CLAIM

Violation Of Section 20(a) Of The Exchange Act Against the Individual Defendants

83. Plaintiff repeats and reiterates the allegations as set forth above as if set forth fully herein. This claim is asserted against the Individual Defendants.

84. Each of the Individual Defendants acted as a controlling person of Janus within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions with the Company, participation in and/or awareness of the Company's operations and/or intimate knowledge of the Company's actual performance, the Individual De-

fendants had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which plaintiff contends are false and misleading. Each of the Individual Defendants was provided with or had unlimited access to copies of the Company's reports, press releases, public filings and other statements alleged by plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

85. In addition, each of the Individual Defendants had direct involvement in the day-to-day operations of the Company and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

86. As set forth above, Janus and the Individual Defendants each violated Section 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint. By virtue of their controlling positions, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of defendants' wrongful conduct, plaintiff and other members of the Class suffered damages in connection with their purchases of the Company's securities during the Class Period.

WHEREFORE, plaintiff prays for relief and judgment, as follows:

(a) Determining that this action is a proper class action, designating plaintiff as Lead Plaintiff and certifying plaintiff as a class representative under Rule 23 of the Federal Rules of Civil Procedure and plaintiffs counsel as Lead Counsel;

(b) Awarding compensatory damages in favor of plaintiff and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of defendants' wrongdoing, in an amount to be proven, at trial, including interest thereon;

(c) Awarding plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

(d) Such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff, hereby demands a trial by jury.

DATED: November 26, 2003

Respectfully submitted,

/s/ _____

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CERTIFICATION OF NAMED PLAINTIFF PURSUANT TO FEDERAL SECURITIES LAWS

I, Craig Wiggins, (Plaintiff) declares, as to the claims asserted under the federal securities laws, that:

1. Plaintiff has reviewed the Complaint and retains Schiffrin & Barroway, LLP and such co-

counsel it deems appropriate to associate with to pursue such action on a contingent fee basis.

2. Plaintiff did not purchase the security that is the subject of this action at the direction of Plaintiff's counsel or in order to participate in any private action.

3. Plaintiff is willing to serve as a representative party on behalf of the class, including providing testimony at deposition and trial, if necessary.

4. Plaintiff's transactions in the Janus Capital Group, Inc. (Formerly known as Stilwell Financial, Inc.) (NYSE: JNS) security that is the subject of this action during the Class Period are as follows:

No. of Shares	Buy/Sell	Date	Price Per share
900	Bought	10/15/02	$12.36

List additional transactions on a separate sheet of paper, if necessary.

5. During the three years prior to the date of this Certification, Plaintiff has sought to serve or served as a representative party for a class in the following actions filed under the federal securities laws: N/A.

6. Plaintiff will not accept any payment for serving as a representative party on behalf of the class beyond the Plaintiff's pro rata share of any recovery, except such reasonable costs and expenses (including lost wages) directly relating to the representation of the class as ordered or approved by the Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of November, 2003

/s/
CRAIG WIGGINS

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

In re MUTUAL FUNDS INVESTMENT LITIGATION	:	MDL No. 1586
This Document Relates To:	:	
In re Alger, Columbia, Janus, MFS, One Group, Putnam, and PIMCP, Civil Action No. 04-md-15863	:	
CRAIG WIGGINS, *et al.*	:	Civil Action No. 04-cv-00818
V.	:	
JANUS CAPITAL GROUP INC., *et al.*	:	

AMENDED COMPLAINT FOR THE JANUS PARENT INVESTOR SUB-SUBTRACK

1. This is a federal class action brought by the Plaintiff on behalf of itself and a Class consisting of all other persons who purchased or otherwise acquired the publicly traded securities of Janus Capital Group Inc. (f/k/a Stilwell Financial Inc.) ("Janus Capital" or "the Company"), between July 21, 2000 and September 2, 2003, inclusive (the "Class Period"), seeking to recover damages caused by Defendants' violations of federal securities laws and pursue remedies under the Securities Exchange Act of 1934 (the "Exchange Act").

NATURE OF THE CLAIM

2. Janus Capital is an asset management firm that launched mutual funds known as the "Janus Funds." Janus Capital manages the Janus Funds through its wholly-owned subsidiary Janus Capital Management LLC ("Janus Management"). Janus Management serves as investment advisor to the Janus Funds, and, in that capacity is responsible for the funds' day-to-day management. The bulk of Janus Capital's revenues come from its creation and operation, directly or through subsidiaries, of the Janus Funds (which, collectively, as of April 2004 had $145 billion of assets under management). Defendants Janus Capital and Janus Management are referred to herein collectively as "Janus."

3. The investment management services provided to the Janus Funds were performed pursuant to advisory contracts, which provide for fees payable to the Janus company that manages the account. The amount of the fees varies depending on the individual mutual fund or account, and is usually based

in substantial part on the level of assets under management.

4. Janus Capital's revenue is derived primarily from investment management and 12b-1 fees received from the Janus Funds. Investment advisory revenues depend largely on the total value and composition of assets under management.

5. Janus represented that its mutual funds were designed to be long-term investments for "buy and hold" investors and were therefore favored investment vehicles for-retirement plans. Certain investors, however, have attempted to use mutual funds to generate quick profits by rapidly trading in and out of certain mutual funds. Typically, these so-called "market timers" seek to capitalize on stale fund prices, often focusing on price discrepancies involving international funds – where the stocks that comprise the fund trade on exchanges whose operating hours are different from those of U.S. markets. Market timers take advantage of price inequities, but do so at the expense and to the detriment of long-term shareholders.

6. Defendants caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that defendants would implement measures to curb market timing in the Janus Funds. As recognized in the prospectuses, Janus' purported market timing policy was designed to protect long-term investors from the negative effects of excessive trading, including, but not limited to: dilution of share value, negative tax consequences, increased transaction costs, and loss of fund investment opportunities.

7. The accuracy of defendants' representations concerning market timing restrictions were of utmost importance to investors in the Janus Funds. Long-term holders would be less likely to invest in Janus Funds absent protection against market timing. Because Janus Capital's revenue depends on attracting and keeping fund investors, and because Janus Capital faces liability exposure if it or its employees or its controlled subsidiaries are found to have misrepresented a fundamental policy, the accuracy of these representations is also material to investors in the common stock of Janus Capital Group.

8. Unbeknownst to Janus fund investors and to Janus Capital common stock investors, throughout the class period Janus was secretly operating many of the Janus funds in a manner inconsistent with Janus' publicly-stated policies concerning market timing. New York Attorney General Elliot Spitzer found, in his investigation of the mutual fund industry, that Janus had entered into secret arrangements with several hedge funds whereby Janus agreed to allow market timing transactions by those hedge funds and agreed to suspend the fees and other measures that Janus had in place to deter market timing. The Attorney General's evidence includes e-mails from Richard Garland, who was the former head of Janus' international operations and who reported directly to former Chief Executive Officer, Mark Whitson. In the emails, Garland advocates allowing a hedge fund to engage in market timing in exchange for a payoff, notwithstanding Janus' publicly-stated policies against such transactions. Furthermore, according to Attorney General Spitzer, knowledge of the misconduct went "up to the very senior levels in the management to the Janus funds." In fact, at least one market source claimed to have

uncovered a memo evidencing Mr. Whitson's direct knowledge of the market timing activity in 2002. Following the filing of Attorney General Spitzer's complaint, Janus admitted to having engaged in secret market timing arrangements with hedge funds during the period of November 2001 through April 2003.

9. In the wake of the Attorney General's release of its evidence in September 2003, and Janus' own subsequent admissions, several Janus executives were forced to resign, including the Chief Executive Officer, Mark Whitson, Lars Sodenberg, who headed Janus' institutional business, and Richard Garland, who headed Janus' international operations. Furthermore, Janus ultimately paid more than $325 million in fines and penalties to settle claims by various regulatory agencies.

10. Needless to say the realization that Janus had lied about the policies allegedly in place to protect long-term investors caused a tremendous erosion of trust and confidence among mutual fund investors. The revelations by the Attorney General and subsequent admissions by Janus triggered an unprecedented level of divestiture from the Janus Funds. In the six months between September 2003 and February 2004, investors withdrew $14 billion from the Janus Funds, more than triple the rate of withdrawals for the previous six months. Relatedly and predictably, Janus' exposure to regulatory penalties and the exodus of mutual fund investors caused a crisis in confidence among Janus Capital Group common stock investors. Thus, the price of Janus Capital Group common stock plummeted approximately 25% from $17.86 on September 2, 2003 to $13.50 on September 26 of that year, as news of the

previously-concealed market timing arrangements became known to the public.

JURISDICTION AND VENUE

11. The claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act, (15 U.S.C. §§ 78j(b) and 78t(a)), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

12. This court has jurisdiction over the subject matter of this action pursuant to § 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331.

13. Venue was proper in the District of Colorado (where this action was initially commenced) pursuant to Section 27 of the Exchange Act and 28 U.S.C. § 1391(b) because Janus Capital and Janus Management are headquartered in that District, and many of the acts and practices complained of herein occurred in substantial part in that District. This action is currently pending in the District of Maryland pursuant to order of the Judicial Panel on Multidistrict Litigation.

14. In connection with the acts, conduct and other wrongs alleged in this amended complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to, the United States mails, interstate telephonic communications and the facilities of the national exchange.

THE PARTIES

15. Court-Appointed Lead Plaintiff, First Derivative Traders, purchased Janus Capital securities during the class period, as set forth in the certification filed at the time this law suit was initially com-

menced, and has suffered damages as a result of the wrongful acts of defendants as alleged herein.

16. Defendant Janus Capital is a corporation organized and existing under the laws of Delaware with its principal place of business located at 100 Fillmore Street, Denver, Colorado 80206. Janus Capital is the product of a merger of Janus Capital Corporation into Stilwell Financial, Inc.

17. According to Janus Capital's Form 10-K for the period ended December 31, 2002, the Company "sponsors, markets and provides investment advisory, distribution and administrative services primarily to mutual funds...." Fees from the management of mutual funds have constituted more than 90% of the Company's revenue and income. The management of the Janus Funds is not merely a small division of some huge conglomerate's business. Managing and advising mutual funds is Janus Capital's primary business.

18. Defendant Janus Capital Management LLC ("Janus Management") is a wholly-owned subsidiary of Janus Capital Group, and is located at 100 Fillmore Street, Denver, Colorado 80206. According to the Janus Mercury Fund February 28, 2003 prospectus, Janus Management (together with its predecessors) has served as investment advisor to the Janus Funds since 1970, and currently serves as the investment advisor to all of the Janus Funds, acts as sub-advisor for a number of private-label mutual funds, and provides separate account advisory services for institutional accounts. Janus Management, as investment advisor to the funds, is responsible for the day-to-day management of its investment portfolio and other business affairs of the funds. Janus Management furnishes advice and rec-

ommendations concerning the funds' investments, as well as administrative, compliance and accounting services for the funds, and the funds pay Janus Management a management fee, which is calculated daily and paid monthly.

CLASS ACTION ALLEGATIONS

19. Plaintiff brings this action as a federal class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3) on behalf of a class (the "Class"), consisting of those who purchased the securities of Janus Capital between July 21, 2000 and September 2, 2003, inclusive (the "Class Period"), and who were damaged thereby. Excluded from the Class are defendants, the officers and directors of Janus Capital and its subsidiaries, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

20. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, Janus Capital common shares were actively traded on the New York Stock Exchange ("NYSE"). While the exact number of Class members is unknown to plaintiff at this time and can only be ascertained through appropriate discovery, plaintiff believes that there are hundreds or thousands of members in the proposed Class. During the class period, Janus Capital had more than 235 million shares outstanding, and average daily trading volume is significantly in excess of 1 million shares. Record owners and other members of the Class may be identified from records maintained by Janus Capital or its transfer agent and may be notified of the pendency of this action by mail, using the

form of notice similar to that customarily used in securities class actions.

21. Plaintiff's claims are typical of the claims of the members of the Class, as all members of the Class were similarly affected by defendants' wrongful conduct in violation of federal law that is complained of herein.

22. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation.

23. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether the federal securities laws were violated by defendants' acts as alleged herein;

(b) whether statements made by defendants to the investing public during the Class Period misrepresented material facts about the business, operations, and management of Janus Capital and its subsidiaries including the Janus Funds and their managers;

(c) whether defendants breached any duty to convey material facts or to correct material facts previously disseminated;

(d) whether the defendants acted willfully, with knowledge or recklessly, in omitting and/or misrepresenting material facts;

(e) whether the market prices for Janus Capital securities were artificially inflated as a result of defendants' conduct; and

(f) to what extent the members of the Class have sustained damages and the propel measure of damages.

24. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for many members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

BACKGROUND

The Problem with Market Timing

25. Mutual funds are meant to be long-term investments. They are designed for buy-and-hold investors, and thus are the favored repository for long-term goal oriented investment accounts. In spite of this, quick-turnaround traders frequently try to trade in and out of certain mutual funds in order to exploit the inefficiencies in the way they set their Net Asset Values ("NAVs").

26. "Market timers" seek to capitalize on the fact that some funds use "stale" prices to calculate the value of securities held in their portfolio, prices which do not necessarily reflect the "fair value" of such securities as of the time the NAV is calculated. A typical example is a U.S. mutual fund that holds Japanese shares. Due to the time zone difference, the Japanese market may close at 2:00 a.m. New York time. If the U.S. mutual fund manager uses the closing prices of the Japanese shares in her fund to calculate an NAV at 4:00 p.m. in New York, she is

relying on market information that is fourteen hours old. Any positive market moves during the New York trading day that will likely cause the Japanese market to rise when it later opens will not be reflected in the "stale" Japanese prices, and thus the overall fund's NAV will be artificially low. A trader who buys the Japanese fund at the "stale" price is virtually assured of a profit that can be realized the next day by selling. This and similar strategies are known as "time zone arbitrage." Taking advantage of this kind of short-term arbitrage repeatedly in a single mutual fund is called "timing" the fund.

27. Effective timing captures an arbitrage profit, which comes dollar-for-dollar from the pockets of long-term investors. The timer steps in at the last minute and takes part of the buy-and-hold investors' upside when the market goes up; and as a result the next day's NAV is reduced for those who are still in the fund. Conversely, if the timer sells short on days market prices are falling, the arbitrage has the effect of making the next day's NAV lower than it would otherwise have been, thus magnifying the losses that investors are experiencing in a declining market.

28. Besides the wealth transfer of arbitrage (known as "dilution"), timers also harm their target funds by imposing unnecessary transaction costs on the funds through their frequent trading.

The Importance of Anti-Market Timing Safeguards

29. Were investors aware that the Janus Funds were subject to dilution and were being saddled with extra costs as a result of market timers, they would be far less attracted to investing in those funds.

30. If mutual fund investors were less attracted to investment in Janus Funds, they would shift their money into other investments. This decrease in funds under management at Janus would have a direct impact on Janus' bottom line and affect the profitability and attractiveness of Janus Capital's common stock, given the fact that such a large portion of Janus Capital's revenues come from fees that are based on the amount of funds under management in the Janus Funds.

31. It is for this reason, among others, that Janus wrote and represented its policy against market timers, recognizing the additional costs and other adverse effects that market timing and other short-term trading places on mutual funds.

32. Mutual fund managers are well aware of the damaging effect that timers have on their funds. One study estimated that U.S. mutual funds lose $4 billion per year to timers. Eric Zitzewitz, Who Cares About Shareholders? Arbitrage-Proofing Mutual Funds (October 2002) 35, http://faculty-gsb.stanford.edu/zitzewitz/Research/arbitrage1002.pdf. While it is virtually impossible for fund managers to identify every timing trade, large movements in and out of funds are apparent. Moreover, mutual fund managers have several ways of fighting back against timers.

33. Mutual fund managers generally have the power simply to reject timers' purchases. Many funds have also instituted short-term trading fees ("early redemption fees") that effectively wipe out the arbitrage profits that timers exploit, thereby removing the incentive to engage in the market timing trades. Typically, these fees go directly into the affected fund to reimburse it for the costs of short term

trading. In addition, fund managers are required to update NAVs at the end of the day in New York when there have been market moves that might render the NAV stale. This is called giving the fund a "fair value," and eliminates the timers' arbitrage. As fiduciaries for their investors, mutual fund managers are obligated to use their best efforts to employ these available tools to protect their customers from the dilution that timing causes.

34. Notwithstanding the clear harm that timing causes, and fund managers' relatively easy ability to prevent large-scale timing, fund managers nonetheless sometimes succumb to incentives to allow their funds to be timed. Typically a single management company sets up a number of mutual funds to form a family. Janus Management is the manager for the Janus family of funds. While each mutual fund is in fact its own company, as a practical matter the management company runs it. The portfolio managers who make the investment decisions for the funds and the executives to whom they report are all typically employees of the same management company, not the mutual funds themselves. Still, the management company owes fiduciary duties to each fund and each investor in addition to investors of the management company's own securities.

35. The management company makes its profit from fees it charges the funds for financial advice and other services. Such fees are typically a percentage of the assets in the fund, so the more assets in the family of funds, the more money the manager makes. Knowing this, the timer frequently offers the manager more assets in exchange for the right to time.

36. As an investment advisor selling its own funds, Janus was required to provide to all prospective mutual fund customers a copy of the mutual fund prospectus. The prospectus must contain all information that a prospective investor would find relevant in making an educated decision to purchase shares of the mutual fund.

37. Janus' prospectuses did not disclose that certain mutual fund customers were allowed to engage in market timing activity or short-term trading.

MATERIALLY FALSE AND MISLEADING STATEMENTS MADE DURING THE CLASS PERIOD

38. Janus fund prospectuses were filed with the Securities and Exchange Commission and are publicly available from a variety of sources. Janus Capital makes the most recent prospectus for each Janus Fund available on its website, www.janus.com. These prospectuses are issued by Janus Management, which is the investment advisor for the Janus Funds. These prospectuses, which are given to prospective shareholders, included language that said Janus' funds were "not intended for market timing or excessive trading" and said "Janus had measures in place to stop the trading." These statements were materially false and misleading. As New York's Attorney General revealed in September 2003, following a lengthy investigation, and as Janus subsequently admitted, Janus and its subsidiaries had, for years, entered into secret arrangements to allow several hedge funds to engage in market timing transactions in various Janus Funds.

39. The misrepresentations (some of which are detailed immediately below) attracted and retained investments in the Janus Funds and increased Janus

Capital's revenues, thereby artificially inflating Janus Capital's stock price. Had the truth been known, Janus Funds would have been less attractive to investors, and consequently, Janus Capital would have realized lower revenues, so Janus Capital's stock would have traded at lower prices.

40. The "Excessive Trading Policy" in the February 28, 2003 prospectus for the Janus Mercury Fund (one of the funds in which Janus later admitted to allowing market timing) states:

> Frequent trades in your account or accounts controlled by you can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders. The fund is not intended for market timing or excessive trading. To deter these activities, the Fund or its agent may temporarily or permanently suspend or terminate exchange privileges of any investor who makes more than four exchanges out of the Fund in a calendar year and bar future purchases into the Fund by such investor. In addition, the Fund or its agent also may reject any purchase orders (including exchange purchases) by any investor or group of investors indefinitely for any reason, including, in particular, purchase orders that they believe are attributable to market timers or are otherwise excessive or potentially disruptive to the Fund.
>
> Orders placed by an investor in violation of the exchange limits or the excessive trading policies or by investors that the Fund believes are market timers may be revoked or cancelled by the Fund . . .

Virtually identical language was contained in prospectuses for other Janus Funds (*see*, *infra*, §§ 41, 43, 45, 49, 51), and similar language was contained in prospectuses for numerous other mutual funds. Nevertheless, as described further below, hedge funds were allowed to time Janus Fund subject to such a prospectus.

41. The Janus High-Yield Fund is a $940 million fund which has been in existence since December 29, 1995. Janus Management is also the investment advisor for, and manager of, the Janus High-Yield Fund. The February 28, 2003 Prospectus for the Janus High-Yield Fund ("Janus High-Yield Fund Prospectus") states that it is "designed for *long-term investors* who primarily seek current income" (emphasis added). As of September 4, 2003, the Janus High-Yield Fund had a five-year return of 3.85%; three-year return of 4.99%; one-year return of 11.02%; and a return of 8.37% since its inception in December 1995.

42. The Janus Mercury Fund Prospectus states, with respect to the fund-related fees and expenses an investor may expect to bear along with other shareholders, as follows:

> **Shareholder fees**, such as sales loads, redemption fees or exchange fees, are charged directly to an investor's account. The Fund is a no-lead investment, so you will generally not pay any shareholder fees when you buy or sell shares of the Fund.
>
> **Annual fund operating expenses** are paid out of the Fund's assets and include fees for portfolio management, maintenance of shareholder accounts, shareholder servicing, accounting and other services. You do not

> pay these fees directly but ... these costs are borne indirectly by all shareholders.

43. The same language is contained, virtually verbatim, in the February 28, 2003 Janus High-Yield Fund Prospectus, with the added provisions, with respect to shareholder fees, that "if you sell shares of Janus High-Yield Fund that you have held for 3 months or less you may pay a redemption fee."

44. With respect to their policy on the Fund's cash position and use of cash, defendants stated in the Janus Mercury Fund Prospectus, that:

> When the Fund's portfolio manager believes that market conditions are unfavorable for profitable investing, or when he is otherwise unable to locate attractive investment opportunities, the Fund's cash or similar investments may increase. In other words, the Fund does not always stay fully invested in stocks and bonds. Cash or similar investments generally are a residual – they represent the assets that remain after the portfolio manager has committed available assets to desirable investment opportunities. However, the portfolio manager may also temporarily increase the Fund's cash position to, for example, protect its assets, maintain liquidity or meet unusually large redemptions.

45. Again, virtually the identical provision was contained in the February 28, 2003 Janus High-Yield Fund Prospectus:

> When a Fixed-Income Fund's [defined to include the Janus High-Yield Fund] portfolio manager believes that market conditions are unfavorable for profitable investing, or when

> he or she is otherwise unable to locate attractive investment opportunities, the Fund's cash or similar investments may increase. In other words, the Fixed-Income Funds do not always stay fully invested in bonds. Cash or similar investments generally are a residual – they represent the assets that remain after a portfolio manager has committed available assets to desirable investment opportunities. However, a portfolio manager may also temporarily increase a Fund's cash position to, for example, protect its assets, maintain liquidity or meet unusually large redemptions.

46. The Janus Mercury Fund Prospectus also stated, with respect to "Illiquid Investments," that "[t]he Fund may invest up to 15% of its net assets in illiquid investments," and, with respect to "Foreign Securities," that "the Fund may invest without limit in foreign equity and debt securities," and "may invest directly in foreign securities denominated in a foreign currency and not publicly traded in the United States." Once more, the identical provisions were contained in the February 28, 2003 Janus High-Yield Fund Prospectus.

47. Under the heading, "Pricing of Fund Shares," the Janus Mercury Fund Prospectus stated:

> All purchases, sales and exchanges will be processed at the NAV next calculated after your request is received and accepted by the Fund (or the Fund's agent). The Fund's NAV is calculated at the close of the regular trading session of the NYSE (normally 4:00 p.m. New York time) each day that the NYSE is open. In order to receive a day's price, your order must be received by the close of the

> regular trading session of the NYSE. Securities are valued at market value or, if a market quotation is not readily available, or if events or circumstances that may affect the value of portfolio securities are identified between the closing of their principal market and the time the NAV is determined, at their fair value determined in good faith under the procedures established by and under the supervision of the Trustees. Short-term instruments maturing within 60 days are valued at amortized cost, which approximates market value.
>
> Because foreign securities markets may operate on days that are not business days in the United States, the value of a Fund's holdings may change on days when you will not be able to purchase or redeem the Fund's shares.

Again, the Janus High-Yield Fund Prospectus contains virtually the identical provision.

48. Specifically addressing improper practices such as "timing," defendants, in the Janus Mercury Fund Prospectus, filed on Form N-1A with the Securities and Exchange Commission on February 25, 2002, underscored that such practices were harmful of the Fund and its shareholders, and assured investors that they prohibited market timing and used their best efforts to detect and prevent it, stating:

> Frequent trades in your account or accounts controlled by you can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders. The Funds are not intended for market timing or excessive trading. To deter these activities, the

> Funds or their agents may temporarily or permanently suspend or terminate exchange privileges of any investor who makes more than four exchanges out of the Fund in a calendar year and bar future purchases into the Fund by such investor. In addition, the Funds or their agents also may reject any purchase orders (including exchange purchases) by any investor or group of investors indefinitely for any reason, including, in particular, purchase orders that they believe are attributable to market timers or are otherwise excessive or potentially disruptive to the Fund.
>
> Orders placed by investors in violation of the exchange limits or the excessive trading policies or by investors that the Fund believes are market timers may be revoked or cancelled by a Fund on the next business day after receipt of the order. For transactions placed directly with the Funds, the Funds may consider the trading history of accounts under common ownership or control for the purpose of enforcing these policies. Transactions placed through the same financial intermediary on an omnibus basis may be deemed part of a group for the purpose of this policy and may be rejected in whole or in part by a fund.

Prospectuses for the Janus Enterprise Fund, Janus Mercury Fund, Janus High-Yield Fund, Janus Worldwide Fund, and Janus Overseas Fund contain the exact same language in their prospectuses filed on Form N-1A with the Securities and Exchange Commission on February 25, 2002.

49. The prospectus for the Janus Advisor Worldwide Fund and Janus International Growth Fund contains similar language, filed on Form N-1A with the Securities and Exchange Commission on September 30, 2001:

> Frequent trading into and out of a Fund can disrupt portfolio investment strategies and increase fund expenses for all shareholders, including long-term shareholders who do not generate these costs. The Funds are not intended for market timing or excessive trading. The Funds and their agents reserve the right to reject any purchase request (including exchange purchases if permitted by your financial intermediary) by any investor or group of investors indefinitely if they believe that any combination of trading activity in the account(s) is attributable to market timing or is otherwise excessive or potentially disruptive to the Fund. The Funds may refuse purchase orders (including exchange purchases) for any reason without prior notice, particularly orders that the Fund believes are made on behalf of market timers.
>
> The trading history of accounts under common ownership or control may be considered in enforcing these policies. Transactions placed through the same financial intermediary on an omnibus basis may be deemed part of a group for the purpose of this policy and may be rejected in whole or in part by a Fund. Transactions accepted by your financial intermediary in violation of our excessive trading policy are not deemed accepted by the Fund and may be cancelled or revoked by

the Fund on the next business day following receipt by your intermediary.

50. The Janus Mercury Fund Prospectus elsewhere underscored the purported prohibition of market timing by stating, under a separate heading entitled, "Involuntary Redemptions," that "The Fund reserves the right to close an account if the shareholder is deemed to engage in *activities which are illegal or otherwise believed to be determined to the Fund,* ***such as market timing***." The Janus High-Yield Fund Prospectus contains the identical provision.

51. The following prospectuses of funds in which Janus Capital has since admitted to secretly having permitted market timing contained similar language expressing a prohibition of market timing: Janus Overseas Fund Prospectus dated Jan. 31, 2000; Janus Adviser Worldwide Fund Prospectus dated July 31, 2000; Janus Adviser International Fund Prospectus dated July 31, 2000; Janus Prospectus covering the Janus Advisor Worldwide Fund and Janus Adviser International Fund dated Sept. 30, 2001; Janus Enterprise Fund Prospectuses dated Feb. 2, 2001 and July 31, 2001; Janus Prospectuses covering the Janus Worldwide Fund and Janus Overseas Fund dated Feb. 16, 2001; Janus Mercury Fund Prospectus dated Feb. 16, 2001; Janus Prospectus covering the Janus Enterprise Fund and Janus Mercury Fund dated Feb. 25, 2002; and Janus Prospectus covering the Janus High-Yield Fund dated Feb. 25, 2002.

52. Nonetheless, in direct contradiction of defendants' public statements in the Prospectuses, defendants permitted and actively facilitated such market timing, by entering into relationships with

certain hedge funds and other large institutional investors to allow them to conduct late trading and/or market timing.

Other Materially False and Misleading Statements (Distorted Financial Results)

53. Janus' secret arrangements with hedge funds not only contravened a publicly-stated policy regarding the Company's management of its funds, a policy that attracted long-term investors to the Janus Funds, but it also falsely increased the value of its assets under management through the parking of "sticky assets" by the hedge funds in exchange for the right to market time the Janus Funds. These misrepresentations fraudulently increased the attractiveness of securities issued by Janus Capital Group by falsely inflating the Company's earnings reports during the Class Period.

54. On July 21, 2000, the Company, then Stilwell Financial, issued a press release announcing its financial results for the second quarter 2000. The Company reported second quarter 2000 net income of $151.7 million, or 64¢ per diluted share compared to $70.9 million, or 30¢ per diluted share in second quarter 1999. For the six months ended June 30, 2000, Stilwell reported net income of $293.7 million, or $1.25 per diluted share, compared to $131.9 million, or 56¢ per diluted share, for the same 1999 period.

55. On August 14, 2000, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

56. On October 26, 2000, the Company issued a press release to announce its financial results for the

third quarter of 2000. Therein, the company reported second quarter 2000 net income of $170.1 million or 73¢ per diluted share, compared to $82.7 million, or 36¢ per diluted share, in the third quarter 1999. For the nine months ended September 30, 2000, Stilwell reported net income of $510.5 million, or $2.23 per diluted share, compared to $214.6 million, or 95¢ per diluted share, for the same period in 1999. Average assets under management in the third quarter were $324.2 billion, a 97% increase from the same period in 1999. Since September 30, 1999, the substantial growth in assets under management resulted in an increase in revenues from $311.2 million to $609.5 million.

57. On November 14, 2000, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

58. On January 30, 2001, the Company announced its financial results for the fourth quarter and year-end 2000. At that time, Stilwell reported net income of $153.2 million, or 66¢ per diluted share, during the fourth quarter 2000 compared with net income of $98.5 million, or 43¢ per diluted share, in the fourth quarter 1999. For the full year 2000, Stilwell's net income was $663.7 million, or $2.90 per diluted share, compared with $313.1 million, for $1.38 per diluted share, for the same period in 1999. Exclusive of certain nonrecurring items during 2000, net income for 2000 totaled $610.8 million, or $2.67 per diluted share. Additionally, the Company reported:

Fourth Quarter 2000 vs. Fourth Quarter 1999

Stilwell, which includes Janus; Berger LLC, Nelson Money Managers PLC and an approximate 33% equity investment in DST, reported $257.8 billion in assets under management as of December 31, 2000 compared to $257.4 billion as of December 31, 1999. Average assets under management totaled $284.7 billion during fourth quarter 2000 compared to $208.5 billion in prior year's fourth quarter, $324.2 billion in third quarter 2000 and $304.2 billion in second quarter 2000. For the quarter, market depreciation of $57.0 billion and slight net cash outflows (less than $1 billion) resulted an 18% decline in assets under management. This decline in assets under management generally reflected the net effect to the Company of the widely varied fourth quarter 2000 results for the key market indexes (e.g., an approximately 33% decline in the Nasdaq, an 8% decline in the Russell 2000, a 1% increase in the Dow Jones Industrial Average). Shareowner accounts increased by approximately two million compared to December 31, 1999 and totaled approximately 6.3 million as of December 31, 2000.

Operating margins improved in fourth quarter 2000 versus the comparable 1999 period. This improvement is attributable to the 38% increase in revenues, as well as continued success in maintaining an efficient cost structure. Operating expenses of $287.3 million for fourth quarter 2000 exceeded comparable 1999 by $74.5 million, or 35%, but were

9% below third quarter 2000 expenses. The increase in expenses over prior year occurred in the following key categories: i) compensation, primarily related to an increase in the number of employees; ii) third party concession fees resulting from a higher level of assets under management through these distribution arrangements; iii) depreciation and amortization arising from Janus' infrastructure enhancement efforts over the last two years and deferred commission payments in connection with the growth in the Janus World Funds PLC; and iv) professional services fees associated with ongoing web development and maintenance efforts.

Full Year 2000 vs. Full Year 1999

For the year ended December 31, 2000, net cash inflows of assets totaled $68.4 billion (of which Janus contributed $66.9 billion). This industry-leading total was substantially offset by market depreciation of $68.0 billion. Average assets under management increased $137.7 billion, or 84%, compared to the average for the year ended December 31, 1999, resulting in a more than $1 billion improvement in revenues.

Operating margins improved from 42.8% to 46.1% year to year, mirroring the strong improvement quarter to quarter. Higher operating expenses were evident in the same cost components noted in the quarterly discussion above. Compensation and third party concession costs were approximately 36% of total revenues during the year ended December 31, 2000 compared to approximately 38% in

1999. With numerous infrastructure enhancements completed throughout 1999 and 2000 and a 132% increase in deferred commission payments resulting from the growth of Janus' offshore funds, depreciation and amortization grew nearly 130% in 2000 versus 1999. The rapid increase in assets under management during the first half of the year generated significant shareowner activity, thereby requiring substantial temporary employee help, which is recorded as professional services fees. The rate of increase in the remaining operating expenses on a combined basis (approximately 51%) continues to trail the rate of revenue growth, thereby contributing to Stilwell's competitive operating margins.

59. Commenting on these results, Landon H. Rowland, Stilwell's Chairman, President and Chief Executive Officer stated:

> We are pleased to report Stilwell's record quarterly and full year earning For the year, Stilwell's revenues, operating income and net income each grew by more than 85% compared to 1999. These results demonstrate the fantastic achievements of our subsidiaries and highlight the ongoing efforts, diligence and dedication of their management teams.
>
> Movements in Stilwell's assets under management during the fourth quarter generally followed the markets, with market depreciation comprising virtually the entire decline in assets during the quarter. While net flows of cash were essentially flat during the fourth

quarter, the $68.4 billion in net inflows for the year were best in the mutual fund industry. During 2000, Janus closed five funds – including its flagship Janus Fund – with the objective of ensuring ongoing success for existing fund shareowners. These funds totaled nearly 50% of Janus' total assets under management. We are also pleased with the ability of the subsidiaries to develop alternative distribution and service options for shareholders and the contribution of these actions to year-end results.

We believe Stilwell is well-positioned to build on the momentum generated during 1999 and 2000. Each of Stilwell's investments – Janus, Berger, Nelson and DST – continues to develop and promote its brand name and its comparative advantages. During the third and fourth quarters of 2000, as part of Stilwell's $1 billion stock repurchase program, the Company repurchased more than 7 million shares of its common stock through open market transactions. We believe that this investment, much like the investment in our various subsidiaries and affiliates, will prove to be value-enhancing to our existing shareholders. Additionally, we believe the purchase of Janus stock from Tom Bailey will provide an outstanding opportunity to enhance the management incentives at Janus.

60. On March 20, 2001, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

61. On April 23, 2001, the Company issued a press release announcing its financial results for the first quarter 2001. At that time, the Company reported first quarter 2001 net income of $111.4 million or 48¢ per diluted share, compared to $188.7 million, or 84¢ per diluted share in first quarter 2000. Average assets under management in the first quarter were $246.6 billion, a 16% decrease from the same period in 2000.

62. On May 15, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

63. On July 25, 2001, the Company issued a press release announcing its financial results for the second quarter 2001. At that time, the Company reported second quarter 2001 net income of $104.5 million or 46¢ per diluted share, compared to $150.8 million, or 66¢ per diluted share, in second quarter 2000. For the six months ended June 30, 2001, Stilwell reported net income of $216.4 million, or 94¢ per diluted share, compared to $293.7 million, or $1.29 per diluted share for the same 2000 period. Average assets under management in the second quarter were $223.9 billion, a 26% decrease from the same period in 2000.

64. On August 14, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

65. On October 24, 2001, the Company issued a press release announcing its financial results for the third quarter 2001. At that time, the Company reported third quarter 2001 net income of $90.5 million, or 39¢ per diluted share, compared to $170.1

million, or 73¢ per diluted share, in third quarter 2000. For the nine months ended September 30, 2001, Stilwell reported net income of $306.9 million, or $1.33 per diluted share, compared to $463.8 million, or $2.02 per diluted share, for the same period in 2000.

66. On November 14, 2001, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

67. On January 30, 2002, the Company announced its financial results for the fourth quarter and year-end 2001. At that time, Stilwell reported net income of $84 million, or 37¢ per diluted share, during the fourth quarter 2001 compared with net income of $147 million, or 64¢ per diluted share, in the fourth quarter 2000. For the full year 2001, Stilwell's net income was $390.9 million, or $1.70 per diluted share, compared with $610.8 million, or $2.67 per diluted share, for the same period in 2000. Additionally, the Company reported:

> Average assets under management totaled $186.3 billion during fourth quarter 2001, compared to $198.0 billion in third quarter 2001 and $284.7 billion in fourth quarter 2000. The lower level of average assets under management in fourth quarter 2001 versus 2000 resulted in a 37 percent decrease in revenues quarter-to-quarter (to $334.1 million from $530.5 million).
>
> During the year ended December 31, 2001, assets under management declined $65.6 billion (from $257.8 billion to $192.2 billion), of which approximately 92 percent was attributable to market depreciation. Average as-

> sets under management during the year ended December 31, 2001, totaled $213.5 billion, compared to $301.9 billion in 2000, resulting in a decrease in revenues from $2,248.1 million in 2000 to $1,555.7 million in 2001. With lower revenues and the expected margin pressures noted in the fourth-quarter discussion, Stilwell reported a 41 percent decline in ongoing operating income in 2001 versus 2000.

68. Commenting on these results, Landon H. Rowland, Stilwell's Chairman, President and Chief Executive Officer stated:

> The company's impressive EBITDA margins reflect the benefit of Stilwell's $1.5 billion additional investment in Janus during 2001, as well as the strong operating margins achieved at Janus through aggressive cost controls. We believe these margins are a strong indicator of the financial strength and value of our company.
>
> Stilwell reported an ongoing operating margin of 38.9 percent in fourth quarter 2001 and 39.4 percent for full year 2001. The company's ability to maintain these margins is indicative of the variability in the Janus business model and the savings generated from its emphasis on electronic shareowner servicing. Excluding the amortization expense associated with the company's additional investments in Janus during the year, the ongoing operating margin for the three months and year ended December 31, 2001, was 43.6 percent and 41.8 percent, respectively.

> As we move into 2002, each of our core organizations provides opportunities to add shareholder value. Janus is poised to regain momentum through efforts to improve investment performance, its strategic diversification of distribution channels and quality brand name. Berger, through the acquisitions of Bay Isle and INTECH, has strengthened its franchise and established a well-rounded foundation for growth. Nelson continues its steady growth through development of a multi-tiered savings gateway for employees throughout the United Kingdom. These subsidiaries, together with the consistently strong earnings growth at DST, provide the foundation for Stilwell's future.

69. On March 20, 2002, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

70. On April 25, 2002, the Company issued a press release announcing its financial results for the first quarter 2002. At that time, the Company reported first quarter 2002 net income of $97.2 million, or 42¢ per diluted share, compared to $111.4 million, or 48¢ per diluted share, in first quarter 2001. Average assets under management in the first quarter were $188.8 billion, a 27% decrease from the same period in 2000.

71. On May 15, 2002, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

72. On July 25, 2002, the Company issued a press release announcing its financial results for the

second quarter of 2002. At that time, the Company reported second quarter 2002 net income of $73.7 million, or 30¢ per diluted share, compared to $90.4 million, or 39¢ per diluted share, in second quarter 2001. For the six months ended June 30, 2002, Stilwell reported net income of $170.9 million, or 72¢ per diluted share, compared to $201.8 million, or 88¢ per diluted share, for the same 2001 period.

73. On August 14, 2002, the Company filed its quarterly report with the SEC on form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

74. As stated previously, on September 3, 2002, Stilwell announced that it would merge its operations into a unified organization that would market and distribute its investment products globally under the Janus brand name. Additionally, Stilwell stated that Janus would be led by Mark Whitson, who would become Chief Executive Officer on December 31, 2002, the expected date of the merger. An 11-year Janus veteran, Whitson served as president of retail and institutional services. As part of the merger, Janus would be responsible for the strategic direction of Stilwell's investment management subsidiaries. These subsidiaries include Janus Capital Management LLC; Berger Financial Group LLC, which owns Enhanced Investment Technologies LLC ("INTECH") and Bay Isle Financial LLC; and U.K.-based Nelson Money Managers Plc. Collectively, these firms manage approximately $150 billion in assets.

75. On October 30, 2002, the Company issued a press release to announce its financial results for the third quarter of 2002. Therein, the Company reported a net loss of $131.2 million, or (60¢) per di-

luted share, during third quarter 2002 compared to net income of $26.8 million, or 11¢ per diluted share, in third quarter 2001. For the nine months ended September 30, 2002, Stilwell's net income was $39.7 million, or 12¢ per diluted share, compared to $228.6 million, or 99¢ per diluted share, for the same 2001 period.

76. On November 14, 2002, the Company filed its quarterly report with the SEC on Form 10-Q. The Company's Form 10-Q reaffirmed its previously announced financial results.

77. On January 2, 2003, Janus announced that following the merger of Janus Capital Corporation and Stilwell Financial Inc., which became effective on January 1, 2003, shares of the new organization Janus Capital Group Inc. began trading on the New York Stock Exchange under the ticker symbol JNS.

78. On January 30, 2003, Janus announced its financial results for the fourth quarter and year-end 2002. At this time, Janus reported net income of $45.0 million, or 18¢ per diluted share, during the fourth quarter 2002 compared with net income of $73.7, or 32¢ per diluted share, in the fourth quarter 2001. For the full year 2002, Janus' net income was $84.7 million, or 31¢ per diluted share, compared with $302.3 million, or $1.31 per diluted share, for the same period in 2001. The Company's 2002 earnings reflect decreased average assets under management as well as the effects of significant non-recurring items reported in the third quarter 2002. Excluding these non-recurring items, net income for 2002 totaled $244.0 million, or $1.02 per diluted share, compared with $390.9 million, or $1.70 per di-

luted share in 2001. Additionally, the Company reported:

> Fourth Quarter 2002 vs. Fourth Quarter 2001
>
> Janus Capital Group ended the year reporting assets under management of $138 billion, compared with $140 billion as of September 30, 2002 and $193 billion as of December 31, 2001. Assets under management include assets from Janus' investment management subsidiaries: Janus Capital Management LLC; Berger Financial Group LLC, which owns Enhanced Investment Technologies, LLC (INTECH) and Bay Isle Financial LLC; and Nelson Money Managers plc. The total also includes the small- and mid-cap value assets that Perkins, Wolf, McDonnell and Company manages for Berger retail and institutional shareholders. The slight decrease in assets during the quarter reflected market appreciation of $3 billion offset by net redemptions of $5 billion.
>
> Full Year 2002 vs. Full Year 2001
>
> During the year ended December 31, 2002, assets under management decreased $54 billion – from $192 billion to $138 billion. This decline reflected market depreciation of $42 billion, net outflows of $18 billion and increased assets of $6 billion from Berger's acquisition of INTECH. Average assets under management in 2002 declined 23% to $164 billion from $214 billion in 2001. These lower average assets under management led to a 26% decrease in annual revenue – from $1.5 billion to $1.1 billion.

79. Commenting on these results, Whitson stated:

> Today's financial results reflect the challenging environment reflect the challenging environment for growth-orientated investment managers, but I'm confident that we're taking the necessary steps to ensure that Janus is well positioned for future growth[.]... Since we merged Janus and Stilwell, we've made remarkable progress in a very short time.
>
> Earlier this month, Janus introduced seven new value funds and risk-managed equity products to complement its growth-orientated lineup.
>
> Broadening our product offerings is an important step toward improving our top-line growth[.]... We're also focused on controlling costs to manage our business as efficiently as possible.
>
> Nothing is more important to me than improving performance, and we saw signs last year that the steps we're taking to that end are paying off[.]... Our improved relative performance and the results from our more conservative products were bright spots in 2002.
>
> Our focus in 2003 will be to continue improving performance, while leveraging Janus' global distribution network and managing our expenses[.]

80. On March 28, 2003, the Company filed its annual report with the SEC on Form 10-K. Therein, the Company reaffirmed its previously announced results.

81. On April 29, 2003, Janus announced, via a press release, its financial results for the first quarter of 2003. Therein, Janus reported net income of $38.6 million, or 17¢ per diluted share, during the first quarter 2003 compared with $45.0 million, or 20¢ per diluted share in the preceding quarter, and $97.2 million, or 42¢ per diluted share in the first quarter of 2002. Average assets under management in the first quarter 2003 totaled $136.4 billion, a 23% decline from the same period in 2001. This lower level of average assets under management caused the company's revenues to drop 26%–to $284.3 million–from $334.1 million in the fourth quarter of 2001.

82. On May 15, 2003, the Company filed its quarterly report with the SEC on Form 10-Q. Therein, the Company reaffirmed its previously announced results.

83. On July 30, 2003, Janus issued a press release to announce its financial results for the second quarter of 2003. Therein, Janus reported net income of $47.5 million, or 21¢ per diluted share, on revenues of $250.6 million for the quarter ended June 30, 2003. The firm reported net income of $73.7 million, or 33¢ per diluted share, on revenues of $310.4 million in the comparable 2002 quarter. In the first quarter of 2003, net income was $38.6 million, or 17¢ per diluted share, on revenues of $235.5 million. Assets under management at June 30, 2003, totaled $149.8 billion, an increase of $17.1 billion, or 12.9% from the $132.7 billion reported at March 31, 2003, due to $1.6 billion in net inflows combined with $15.5 billion of market appreciation. Of the $1.6 billion in net inflows, $0.2 billion were long-term assets and $1.4 billion came from money markets.

84. On August 12, 2003, the Company filed its quarterly report with the SEC on Form 10-Q. Therein, the Company reaffirmed its previously announced results.

85. The financial statements referenced above were each materially false and misleading because they failed to disclose and/or misrepresented the following adverse facts, among others: (1) that Janus entered into secret, illegal agreements with several hedge funds wherein Janus permitted the hedge funds to time Janus mutual funds; (2) that in exchange for permitting the hedge funds to time Janus mutual funds, those hedge funds deposited "sticky assets" into certain Janus money market funds; (3) that the "sticky assets" deposited into certain Janus money market funds permitted Janus to materially overstate its assets under management and thus permitted Janus to receive a steady flow of fees from such "sticky assets;" and (4) as a result of this illegal scheme, Janus, throughout the Class Period, materially overstated and artificially inflated Janus' income and earnings per share.

THE TRUTH EMERGES

86. On September 3, 2003, New York Attorney General Eliot Spitzer filed a complaint in New York Supreme Court against a hedge fund manager named Canary Partners. The complaint (the "Spitzer Complaint," the contents of which are incorporated by reference herein) charged Canary and its principals with secretly paying several mutual fund managers (including Janus) to allow Canary to engage in, *inter alia*; market timing trades in those mutual funds. The investigation was triggered by a call from a former employee at Canary saying that Canary had secret agreements with Janus and other

mutual fund managers to market time funds. The Attorney General's office interviewed several people associated with Canary and subpoenaed documents, including internal e-mail communications, from Janus and other mutual fund companies prior to filing his complaint

87. The Spitzer Complaint alleged, with regard to Janus, as follows, among other things:

> In or about April, 2002, Janus granted permission for Canary to time the Janus Mercury fund. In exchange, Canary deposited "sticky" money into a Janus money market fund. Canary timed the Janus Mercury fund during 2002 and 2003. Canary also received capacity to time the Janus High Yield fund.
>
> In early 2003, Canary sought timing capacity in Janus' offshore funds. Through an intermediary, it contacted Janus and offered "sticky" assets in exchange for this additional timing capacity. (JCG 000277-000278)[1] In response, a concerned Janus employee sent emails to Richard Garland, the CEO of Janus International, expressing alarm over the volume of market timing activity in Janus Mutual Funds:

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[1] Citations bearing the prefix "JCG" refer to production numbers of internal documents that Attorney General Spitzer obtained from Janus in the course of his investigation. These documents and Attorney General Spitzer's complaint were made publicly available on the New York Attorney General's website attached to the press release announcing the filing of the complaint. The Attorney General's complaint and the referenced supporting documents are incorporated herein by reference.

> I'm getting more concerned w/ all of these market timers and how they are affecting our PM's [i.e., Portfolio Managers] trading activity. [Portfolio Managers] have voiced their sensitivity on a number of occasions re: this type of activity in JWF. I spoke to [a Janus employee] and confirmed that this is a big problem domestically and I want to avoid this at all cost before it gets too problematic offshore. Now that we have our exchange limitation in our prospectus, I would feel more comfortable not accepting this type of business because its too difficult to monitor/enforce & it is very disruptive to the PM's & operation of the funds. Obviously, your call from the sales side.

(JCG 000277)

[A] Janus employee also recommended to Garland [then CEO of Janus International] that Janus refuse the additional business from Canary due to the issues created for portfolio managers: "For now, I don't think we should take-on additional business of this nature.... We need to keep our funds clean & minimise [sic] issues for PM's/fund performance. Do you agree?"

Garland did not agree. He replied: "I have no interest in building a business around market timers, but at the same time **I do not want to turn away $10-$20m!** How big is the [Canary] deal...?" After learning that Canary's timing could amount to between **$10 and $50 million dollars**, Garland gave

the "[g]o ahead" for Canary's additional timing capacity on April 3, 2003.

(Emphasis added).

88. Additionally, the Spitzer complaint alleged, referencing and attaching additional evidence:

> ***Managing the extensive timing activity in its funds became difficult for Janus:*** In early June, 2003, it began to consider adopting a consistent policy on market timing. Discussion concerning development of such a policy was opened up to certain Janus employees. Comments included:
>
> • ***"Our stated policy is that we do not tolerate timers. As such, we won't actively seek timers, but when pressed and when we believe allowing a limited/controlled amount of timing activity will be in JCG's best interests (increased profitability to the firm) we will make exceptions under these paramaters."*** (JCG 000605)
>
> • "My own personal recommendation is not to allow timing, period, and follow the prospectus.... [T]imers often hide multiple accounts and move on the same day which could hurt other investors and enrage the Pms....I don't think the static assets that we might be able to hold onto are worth the potential headaches, nor does this fall into our 'narrow and deep' focus. ***I suggest we maintain the timing agreements we have, but allow no more.*** (JCG 000569-570)

> • ***"[I]f we are going to allow timing, we want to be sure that there are enough static assets [i.e., "sticky" assets] so that we are making a decent profit for all the trouble we are put through."*** (JCG 000569)

(Emphasis added).

89. The Company never denied the allegations in the Spitzer Complaint; in fact, following September 3, 2003, Janus admitted to the facts alleged in the Spitzer Complaint and many others that prove the arrangements to allow market timing in contravention of the Company's stated policies were much more widespread than previously imagined.

90. On September 3, 2003, Janus issued a press release to discuss its reaction to the filing of a complaint against the Company, among others. In it, the Company stated:

> Janus Capital Management intends to continue cooperating with the New York Attorney General's inquiry. Janus is reviewing the complaint closely and is committed to ensuring that the company continues to act in the best interest of Janus fund shareholders.

91. On this revelation Janus Capital's shares began the descent that has ultimately wiped out hundreds of millions of dollars of market capitalization.

92. On September 5, 2003, Janus issued a press release that discussed specific steps the Company planned to take in response to Spitzer's allegations. The company reported in part:

> On Wednesday, Attorney General Spitzer announced that he is investigating trading practices in the mutual fund industry. The investigation was prompted by the Attorney General's settlement with a hedge fund, Canary Capital Partners LLC, which allegedly engaged in irregular trading practices with certain mutual fund companies.
>
> "We've long viewed market timing as an industry wide problem involving both mutual funds and the many intermediaries with whom investors work," Whiston said. "Regardless, we have to do what's right for our fund shareholders. It's our hope that the measures we're announcing today will help resolve this situation in a way that recognizes the importance of the matter. Most of all, we hope this action demonstrates that Janus is committed to living up to the high ethical standards that our shareholders expect of us."

93. On October 29, 2003, Janus issued a press release announcing its financial results for the third quarter of 2003. Therein, the Company reported in part:

> Janus Capital Group Inc. today reported third-quarter net income of $50.9 million, or $0.22 per diluted share, on revenues of $256.6 million. The quarterly net income includes a preliminary charge of $9.0 million to account for costs related to the investigation into mutual fund trading.
>
> In the second quarter of 2003, net income totaled $47.5 million, or $0.21 per diluted share, on revenues of $245.5 million. In the

> third quarter of 2002, the firm reported a net loss of $131.2 million, or $0.59 per diluted share, from revenues of $252.7 million. The loss in the third quarter of 2002 was caused in part by a non-cash deferred income tax charge of $107.8 million and a corporate restructuring charge of $59.4 million.

94. As shocking as the Spitzer Complaint's allegations were, they were the tip of the iceberg. Janus' secret deals, in contravention of its publicly-stated policies, were not limited to the arrangements from 2002 with Canary that were described in the Spitzer complaint. Janus would eventually admit that the secret market timing arrangements covered a much longer time period and involved many more hedge funds.

95. In December 2003, Janus acknowledged that it had special trading arrangements with 10 investors starting November 2001 and continuing to mid-2003. Janus admitted that the market timers made millions of dollars in profits and some of the agreements with Janus involved the waiver of redemption fees (which were meant to discourage market timing).

96. As was reported by Bloomberg and others on December 19, 2003, Janus admitted that 10 unidentified investors were permitted to buy and sell shares more frequently than was normally allowed. The trading began in November 2001 and occurred as recently as the first half of 2003 with net gains realized by the investors exceeding $20 million.

97. On Monday, November 17, 2003, Janus announced that Richard Garland, Chief Executive of Janus International, had resigned. Garland's name had emerged in the initial investigation in Septem-

ber which included an e-mail that Garland wrote concerning an arrangement to allow Canary Capital Partners to engage in market timing trades in Janus Funds.

98. As was reported by Bloomberg and others on September 30, 2003, Janus admitted that it had earned money from market timing in 7 different funds: Janus Mercury Fund, Janus Worldwide Fund, Janus Enterprise Fund, Janus High-Yield Fund, Janus Overseas Fund, Janus Adviser Worldwide Fund, and the Janus Adviser International Growth Fund.

99. As a result of these admissions, the Company was forced to pay huge sums to settle claims with regulators, restructure senior management and restore investor confidence in the future of Janus.

100. On April 27, 2004, Janus agreed to cut fees by $125 million and pay $101 million in penalties to settle allegations by New York and Colorado regulators.

101. Standard & Poor's reported that Janus experienced $8.1 billion in net redemptions in fourth quarter 2003 and $10.5 billion in net redemptions in the first quarter 2004.

102. As the Wall Street Journal reported on April 27, 2004, the settlement announced that day was more than triple the amount Janus had previously said it would repay to fund shareholders as a result of the market timing and allegations. The Wall Street Journal also reported that "[i]n addition to the monetary penalties, Janus agreed to a requirement that the Chairman of its mutual fund boards be 'truly independent'. Until March of 2004,

Janus founder and former Chief Executive, Tom Bailey served in that role."

103. As the Wall Street Journal reported on April 21, 2004, in the wake of the scrutiny, Mr. Whitson stepped down as Chief Executive Officer. His departure followed that of Richard Garland, the head of Janus' international operations, who stepped down in November 2003. Earlier in April 2004, Lars A. Soderberg, head of Janus' institutional business agreed to take a leave of absence.

104. As the New York Law Journal reported on August 19, 2004, Janus agreed to settle charges brought by the Securities and Exchange Commission by paying over $100 million. The S.E.C. "found that Janus made arrangements with 12 entities allowing them to market time several funds managed by the advisory group."

IMPACT OF THE REVELATIONS ON JANUS CAPITAL AND ITS STOCK

105. On April 27, 2004, Janus reported a first quarter net loss of $19.3 million or $0.08 a share. The company took the charge of $59 million or $0.21 a share for civil penalties, restitution, payments and legal charges relating to the allegations of improper market timing trades (Bloomberg 4/28/04).

106. As the Wall Street Journal reported on February 5, 2004, Janus booked a fourth quarter charge of $62.8 million directly related to the admitted market-timing-related misconduct, and warned that further charges may come.

107. As the Wall Street Journal article reported on April 28, 2004:

> For Janus, the settlements pale in comparison to the damage already done by the trading scandal. Janus now oversees $145 billion in assets, down from $320 billion at the peak of the technology stock above early 2000.... In the first 8 months of last year [2003], investors withdrew a net $5.1 billion from Janus funds according to financial research group. Between September [2003] and February [2004], investors yanked out an additional $14 billion.

108. An April 28, 2004 Bloomberg article added that investors took out $7.7 billion from Janus mutual funds in the first quarter of 2004.

109. Bloomberg reported on March 8, 2004 that several institutional clients, including insurers for which Janus serves as a sub-adviser, announced plans to replace Janus as a manager of billions of dollars of assets.

110. It was entirely foreseeable that the Spitzer Complaint allegations and Janus' additional subsequent admissions would cause large numbers of investors to divest from the Janus Funds. After all, the capital of long-term investors had been attracted through a series of public misrepresentations concerning Janus' policies toward market timing. Long term investors were less likely to invest in a fund that encouraged market timing, and most investors were less likely to invest in a fund that engages in secret contravention of its publicly-stated policies.

111. It was also entirely foreseeable that the revelations concerning the secret market timing arrangements would have material impact on Janus Capital's common stock price. After all, Janus Capital depended on fund investments for revenue, and

when the truth concerning Janus became known, fund investments – many of which had been procured through fraudulent misrepresentations – were likely to decline (and, in fact, they did), and Janus was likely to face liability to regulatory agencies and fund investors (which, in fact, it did).

112. Equity market reaction to the news of Janus' misconduct was swift and demonstrates the severity and materiality of the Company's misconduct. Shares of Janus Capital stock fell noticeably throughout September 2003, as the truth concerning Janus' misconduct was revealed to the public. Janus Capital's common stock traded at $17.68 per share on September 2, 2003, just before the allegations of the Spitzer Complaint were revealed publicly. By September 4, it had plunged 12.7% to $15.60. By September 26, it had fallen to $13.50. The average price of Janus common stock for the 90 days following the end of the Class Period was $14.42, which is 19.26%, or $3.44, below Janus' closing price on the last day of the Class Period.

ADDITIONAL SCIENTER ALLEGATIONS

113. As alleged herein, defendants acted with scienter in that defendants knew that the public documents and statements issued or disseminated in the name of Janus were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, defendants, by virtue of receipt of information reflecting the true facts regarding Janus, their control over, and/or receipt and/or modi-

fication of Janus' allegedly materially misleading misstatements and/or their associations with the Company which made them privy to confidential proprietary information concerning Janus, participated in the fraudulent scheme alleged herein.

114. Defendants knew and/or recklessly disregarded the falsity and misleading nature of the information which they caused to be disseminated to the investing public. The ongoing fraudulent scheme described in this Amended Complaint could not have been perpetrated over a substantial period of time, as has occurred, without the knowledge and complicity of the personnel at the highest level of the Company.

115. Fees from the management of mutual funds have constituted in excess of 90% of the Company's revenue and income. At all relevant times Janus' management has taken a primary interest in the way their mutual funds are managed because income from these funds represents almost all of the Company's income. As such, management had a duty to be involved in decisions regarding or at a minimum aware of agreements entered into by Janus Funds and certain large investors.

116. The Wall Street Journal on April 27, 2004 quoted New York Attorney General Elliot Spitzer as saying, "[t]he behavior here was made more problematic because of the knowledge ... [which went] up to the very senior levels in the management of the Janus funds."

117. Management's knowledge of the misconduct is evidenced by the emails from Mr. Garland revealed in the Spitzer Complaint. Garland was not some low-level manager. As the Wall Street Journal reported on April 6, 2004, Messrs. Garland and So-

derberg (who also resigned in the wake of the scandal) reported directly to Janus Chief Executive, Mark Whitson.

118. Mr. Whitson himself ordered a study of market timing in Janus' funds and received the results of the study in November 2002, according to a Wall Street Journal report published on April 21, 2004. Yet, the market timing trades continued until at least 2003 according to the complaint filed against Canary by Attorney General Elliot Spitzer in September.

119. According to Dow Jones news on March 26, 2004, CBS Market Watch claimed to have obtained an internal Janus memorandum that shows that Mr. Whitson and other Janus senior managers knew about the market timing trades in 2002.

120. In any event, Janus' knowledge of the misconduct occurred through the actions of Mr. Garland and other fund managers who authorized the market timing arrangements. Moreover, it is reasonable to infer that Janus' senior management knew of the misconduct or, at the very least, was reckless in not knowing, given the undisputable knowledge on the-part of Mr. Garland, and others who reported directly to Mr. Whitson, and given the study Mr. Whitson had commissioned, and given the importance of the mutual fund operations to the overall business of defendants Janus Capital and Janus Management.

APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD-ON-THE-MARKET DOCTRINE

121. The market for Janus Capital common stock was open, well-developed and efficient at all

relevant times. As a result of these materially false and misleading statements and failures to disclose, Janus' publicly traded securities traded at artificially inflated prices during the Class Period. Plaintiff and other members of the Class purchased or otherwise acquired Janus Capital common stock relying upon the integrity of the market price of those securities and market information relating to Janus, and have been damaged thereby.

122. During the Class Period, defendants materially misled the investing public, thereby inflating the price of Janus Capital common stock, by publicly issuing false and misleading statements and omitting to disclose material facts necessary to make defendants' statements, as set forth herein, not false and misleading. Said statements and omissions were materially false and misleading in that they failed to disclose material adverse information and misrepresented the truth about the Company, its business and operations, as alleged herein.

123. At all relevant times, the material misrepresentations and omissions particularized in this Amended Complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by plaintiff and other members of the Class. As described herein, during the Class Period, defendants made or caused to be made a series of materially false or misleading statements about Janus' business, operations and operating policies, thus causing Janus Capital common stock to be overvalued and artificially inflated at all relevant times. Defendants' materially false and misleading statements during the Class Period resulted in plaintiff and other members of the Class purchasing Janus Capital securities at artificially inflated

prices, thus causing the damages complained of herein.

124. At all relevant times, the market for Janus Capital common stock was an efficient market for the following reasons, among others: (a) Janus Capital stock met the requirements for listing, and was listed and actively traded on the NYSE, the largest stock market in the United States, with more than 235 million shares outstanding and average daily trading volume significantly in excess of 1 million shares; (b) as a regulated issuer, Janus Capital filed periodic public reports with the SEC and the NYSE, including S-3 registrations; (c) Janus regularly communicated with public investors via established market communication mechanisms, including through regular disseminations of press releases on the national circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services, and Janus fund prospectuses were publicly available through; *inter alia*, various online sources; and (d) Janus Capital was followed by securities analysts at several major securities firms, including, *inter alia*, UBS, CIBC World Markets and Morgan Stanley, who wrote reports which were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace.

125. As a result of the foregoing, the market for Janus Capital publicly traded securities promptly digested current information regarding Janus from all publicly available sources and reflected such information in Janus Capital's stock price. Janus Capital's stock price reacted promptly to material in-

formation about the Company. Under these circumstances, all purchasers of Janus Capital publicly traded securities during the Class Period suffered similar injury through their purchase of those securities at artificially inflated prices, and a presumption of reliance applies.

FIRST CLAIM

Violation Of Section 10(b) Of The Exchange Act And Rule 10b-5 Promulgated Thereunder Against All Defendants

126. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

127. During the Class Period, defendants carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing public, including plaintiff and other Class members, as alleged herein and (ii) cause plaintiff and other members of the Class to purchase Janus Capital securities at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, defendants, and each of them, took the actions set forth herein.

128. Defendants (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities in an effort to maintain artificially high market prices for Janus Capital securities in violation of Section 10(b) of the Exchange Act and Rule 10b-5. Both defendants are sued either as primary participants in the

wrongful and illegal conduct charged herein or as controlling persons as alleged below.

129. Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business and operations of Janus as specified herein.

130. These defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of Janus' value and performance, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about Janus, its financial performance and its business operations and its policies concerning market timing in the light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of Janus Capital during the Class Period.

131. The defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing Janus' operating condition, financial per-

formance and true operating policies from the investing public and supporting the artificially inflated price of its securities. As demonstrated by defendants' overstatements and misstatements of the Company's business and operations throughout the Class Period, defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false or misleading.

132. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price of Janus Capital's securities was artificially inflated during the Class Period. In ignorance of the fact that market prices of Janus Capital's publicly-traded securities were artificially inflated, and relying directly or indirectly on the false and misleading statements made by defendants, or upon the integrity of the market in which the securities trade, and/or on the absence of material, adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, plaintiff and the other members of the Class acquired Janus Capital securities during the Class Period at artificially high prices and were damaged thereby.

133. At the time of said misrepresentations and omissions, plaintiff and other members of the Class were ignorant of their falsity, and believed them to be true. Had plaintiff and the other members of the Class and the marketplace known the truth regarding Janus' illegal agreements with market timers, which were not disclosed by defendants, plaintiff and

other members of the Class would not have purchased or otherwise acquired their Janus Capital securities, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices which they paid.

134. By virtue of the foregoing, defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

135. As a direct and proximate result of defendants' wrongful conduct, plaintiff and the other members of the Class suffered damages in connection with their respective purchases and sales of Janus Capital securities during the Class Period.

SECOND CLAIM

Violation Of Section 20(a) Of The Exchange Act Against Janus Capital

136. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

137. Janus Management is the largest and most important subsidiary of Janus Capital. The operation of Janus Management was ultimately the responsibility of Janus Capital. Janus Capital had the power to control Janus Management and did exercise this power.

138. Furthermore, Helen Hayes was during all or part of the Class Period a director of Janus Capital. Additionally, Ms. Hayes served as Managing Director of Investments and as a portfolio manager at Janus Management. She served in a day-to-day supervisory position at Janus Management and had the power to control its operations.

139. Mark Whitson, before becoming Chief Executive Officer and President of Janus Capital, served as President of Retail and Institutional Services for Janus Management during part of the class period. Prior to the formation of Janus Management he held the same position with Janus Capital Corporation. Moreover, Mr. Whitson commissioned an inquiry into market timing of Janus Funds, the results of which he received in 2002 (*see* ¶118, *supra*). Mr. Whitson knew about the misconduct. Acting on behalf of Janus Capital, Mr. Whitson, and through him, Janus Capital, had and exercised the power to control the activities of Janus Management.

140. As set forth above, Janus Management violated Section 10(b) and Rule 10b-5 by its acts and omissions as alleged in this Complaint. By virtue of its position as a controlling person, Janus Capital is liable on account of Janus Management's fraud pursuant to Section 20(a) of the Exchange Act.

PRAYER FOR RELIEF

WHEREFORE, lead plaintiff prays for relief and judgment, as follows:

(a) Determining that this action is a proper class action, designating lead plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure and lead plaintiffs counsel as Class Counsel;

(b) Awarding compensatory damages in favor of lead plaintiff and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

(c) Awarding plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

(d) Such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: September 29, 2004

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February 25, 2002

Janus Mercury Fund

Prospectus

The Securities and Exchange Commission has not approved or disapproved of these securities or passed on the accuracy of this Prospectus. Any representation to the contrary is a criminal offense.

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RISK/RETURN SUMMARY

JANUS MERCURY FUND

Janus Mercury Fund (the "Fund") is designed for long-term investors who primarily seek growth of capital and who can tolerate the greater risks associated with common stock investments.

1. What is the investment objective of the Fund?

Janus Mercury Fund seeks long-term growth of capital.

The Fund's Trustees may change this objective or the Fund's principal investment policies without a shareholder vote. The Fund will notify you at least 60 days before making any material changes to its objective or principal investment policies. If there is a material change to the Fund's objective or principal investment policies, you should consider whether the Fund remains an appropriate investment for you. There is no guarantee that the Fund will meet its objective.

2. What is the main investment strategies of the Fund?

The portfolio manager applies a "bottom up" approach in choosing investments. In other words, the Fund's portfolio manager looks at companies one at a time to determine if a company is an attractive investment opportunity and consistent with the Fund's investment policies. If the portfolio manager is unable to find such investments, a significant portion of the Fund's assets may be in cash or similar investments.

Within the parameters of its specific investment policies discussed below, the Fund may invest

without limit in foreign equity and debt securities.

Within the parameters of its specific investment policies discussed below, the Fund will limit its investment in high yield/high risk bonds to less than 35% of its net assets.

The Fund invests primarily in common stocks selected for their growth potential. The Fund may invest in companies of any size, from larger, well-established companies to smaller, emerging growth companies.

3. What are the main risks of investing in the Fund?

The biggest risk is that the Fund's returns may vary, and you could lose money. The Fund is designed for long term investors who can accept the risks of investing in a portfolio with significant common stock holdings. Common stocks tend to be more volatile than other investment choices.

The value of the Fund's portfolio may decrease if the value of an individual company in the portfolio decreases. The value of the Fund's portfolio could also decrease if the stock market goes down. If the value of the Fund's portfolio decreases, the Fund's net asset value (NAV) will also decrease, which means if you sell your shares in the Fund you may get back less money.

An investment in the Fund is not a bank deposit and is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency.

The following information provides some indication of the risks of investing in the Fund by

showing how the Fund's performance has varied over time. The bar chart depicts the change in performance from year to year during the period indicated. The table compares the Fund's average annual returns for the periods indicated to a broad-based securities market index.

Janus Mercury Fund

	Average annual return for periods ended 12/31/01		
	1 year	*5 years*	*Since Inception (5/3/93)*
Janus Mercury Fund			
Return Before Taxes	(29.78)%	13.53%	17.68%
Return After Taxes on Distributions	(29.84)%	10.95%	14.82%
Return After Taxes on Distributions and Sale of Fund Shares*	(18.14)%	10.65%	14.10%
S&P 500 Index† (reflects no deduction for expenses or taxes)	(11.88)%	10.70%	13.85%

After-tax returns are calculated using the historical highest individual federal marginal in-

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come tax rates and do not reflect the impact of state and local taxes. Actual after-tax returns depend on your individual tax situation and may differ from those shown in the preceding table. The after-tax return information shown above does not apply to Fund shares held through a tax-deferred account, such as a 401(k) plan or IRA.

The Fund's past performance (before and after taxes) does not necessarily indicate how it will perform in the future.

FEES AND EXPENSES

Shareholder fees, such as sales loads, redemption fees or exchange fees, are charged directly to an investor's account. The Fund is a no-load investment, so YOU will generally not pay any shareholder fees when you buy or sell shares of the Fund.

Annual fund operating expenses are paid out of the Fund's assets and include fees for portfolio management, maintenance of shareholder accounts, SHAREHOLDER servicing, accounting and other services. You do not pay these fees directly but, as the example below shows, these costs are borne indirectly by all shareholders.

This table describes the fees and expenses that you may pay if you buy and hold shares of the Fund. It is based upon gross expenses (without the effect of expense offset arrangements). All of the fees and expenses shown were determined based on net assets as of the fiscal year ended October 31, 2001.

Janus Mercury Fund	*Management Fee* 0.65%	*Other Expenses* 0.24%	*Total Annual Fund Operating Expenses* 0.89%

EXAMPLE:

This example is intended to help you compare the cost of investing in the Fund with the cost of investing in other mutual funds. The example assumes that you invest $10,000 in the Fund for the time periods indicated and then redeem all of your shares at the end of those periods. The example also assumes that your investment has a 5% return each year and that the Fund's operating expenses remain the same. Although your actual costs may be higher or lower, based on these assumptions your costs would be:

	1 Year	*3 Years*	*5 Years*	*10 Years*
Janus Mercury Fund	$91	$2834	$493	$1,096

INVESTMENT OBJECTIVE, PRINCIPAL INVESTMENT STRATEGIES AND RISKS

This section takes a closer look at the investment objective of the Fund, its principal investment strategies and certain risks of investing in the Fund. Strategies and policies that are noted as "fundamental" cannot be changed without a shareholder vote.

Please carefully review the "Risks" section of this Prospectus for a discussion of risks associated with certain investment techniques. We've also included a Glossary with descriptions of investment terms used throughout this Prospectus.

INVESTMENT OBJECTIVE AND PRINCIPAL INVESTMENT STRATEGIES

Janus Mercury Fund seeks long-term. growth of capital. It pursues its objective by investing primarily in COMMON stocks selected for their

growth potential. The Fund may invest in companies of any size, from larger, well-established companies to smaller, emerging growth companies.

The following questions and answers are designed to help you better understand the Fund's principal investment strategies.

1. How are common stocks selected?

Consistent with its investment objective and policies, the Fund may INVEST substantially all of its assets in common stocks if the portfolio manager believes that common stocks will appreciate in value. The portfolio manager generally takes a "bottom up" approach to selecting companies. This means that he seeks to identify individual companies with earnings growth potential that may not be recognized by the market at large. The portfolio manager makes this assessment by looking at companies one at a time, regardless of size, country of organization, place of principal business activity, or other similar selection criteria.

Realization of income is not a significant consideration when choosing investments for the Fund. Income realized on the Fund's investments may be incidental to its objective.

2. Are the same criteria used to select foreign securities?

Generally, yes. The portfolio manager seeks companies that meet his selection criteria, regardless of where a company is located. Foreign securities are generally selected on a stock-by-stock basis without regard to any defined allocation among countries or geographic regions.

However, certain factors such as expected levels of inflation, government policies influencing business conditions, the outlook for currency relationships, and prospects for economic growth among countries, regions or geographic areas may warrant greater consideration in selecting foreign securities. There are no limitations on the countries in which the Fund may invest and the Fund may at times have significant foreign exposure.

3. What does "market capitalization" mean?

Market capitalization is the most commonly used measure of the size and value of a company. It is computed by multiplying the current market price of a share of the company's stock by the total number of its shares outstanding. The Fund does not emphasize companies of any particular size.

GENERAL PORTFOLIO POLICIES

In investing its portfolio assets, the Fund will follow the general policies listed below. The percentage limitations included in these policies and elsewhere in this Prospectus apply at the time of purchase of a security. So, for example, if the Fund exceeds a limit as a result of market fluctuations or the sale of other securities, it will not be required to dispose of any securities.

Cash Position

When the Fund's portfolio manager believes that market conditions are unfavorable for profitable investing, or when he is otherwise unable to locate attractive investment opportunities, the Fund's cash or similar investments may increase. In other words, the Fund does not always stay

fully invested in stocks and bonds. Cash or similar investments generally are a residual — they represent the assets that remain after the portfolio manager has committed available assets to desirable investment opportunities. However, the portfolio manager may also temporarily increase a Fund's cash position to, for example, protect its assets, maintain liquidity or meet unusually large redemptions. The Fund's cash position may also increase temporarily due to unusually large cash inflows. When the Fund's investments in cash or similar investments increase, it may not participate in market advances or declines to the same extent that it would if the Fund remained more fully invested in stocks.

Other Types of Investments

The Fund invests primarily in domestic and foreign equity securities, which may include preferred stocks, common stocks, and securities convertible into common or preferred stocks. To a lesser degree, the Fund may invest in other types of domestic and foreign securities and use other investment strategies, which are described in the Glossary. These may include:

- debt securities
- indexed/structured securities
- high-yield/high-risk bonds (less than 35% of the Fund's assets)
- options, futures, forwards, swaps and other types of derivatives for hedging purposes or for non-hedging purposes such as seeking to enhance return

- short sales (no more than 8% of the Fund's assets may be invested in "naked" short sales)
- securities purchased on a when-issued, delayed delivery or forward commitment basis

Illiquid Investments

The Fund may invest up to 15% of its net assets in illiquid investments. An illiquid investment is a security or other position that cannot be disposed of quickly in the normal course of business. For example, some securities are not registered under U.S. securities laws and cannot be sold to the U.S. public because of SEC regulations (these are known as "restricted securities"). Under procedures adopted by the Fund's Trustees, certain restricted securities may be deemed liquid, and will not be counted toward this 15% limit.

Foreign Securities

Within the parameters of its specific investment policies, the Fund may invest without limit in foreign equity and debt securities. The Fund may invest directly in foreign securities denominated in a foreign currency and not publicly traded in the United States. Other ways of investing in foreign securities include depositary receipts or shares and passive foreign investment companies.

Special Situations

The Fund may invest in special situations. A special situation arises when, in the opinion of the Fund's portfolio manager, the securities of a particular issuer will be recognized and appreciate in value due to a specific development with

respect to that issuer. Special situations may include significant changes in a company's allocation of its existing capital, a restructuring of assets, or a redirection of free cash flow. Developments creating a special situation might include, among others, a new product or process, a technological breakthrough, a management change or other extraordinary corporate event, or differences in market supply of and demand for the security. The Fund's performance could suffer if the anticipated development in a "special situation" investment does not occur or does not attract the expected attention.

Portfolio Turnover

The Fund generally intends to purchase securities for long-term investment, although, to a limited extent, the Fund may purchase securities in anticipation of relatively short-term price gains. Short-term transactions may also result from liquidity needs, securities having reached a price or yield objective, changes in interest rate or the credit standing of an issuer, or by reason of economic or other developments not foreseen at the time of the investment decision. The Fund may also sell one security and simultaneously purchase the same or a comparable security to take advantage of short-term differentials in bond yields or securities prices. Portfolio turnover is affected by market conditions, changes in the size of the Fund, the nature of the Fund's investments and the investment style of the portfolio manager. Changes are made in the Fund's portfolio whenever the portfolio manager believes such changes are desirable. Portfolio turnover

rates are generally not a factor in making buy and sell decisions.

Increased portfolio turnover may result in higher costs for brokerage commissions, dealer mark-ups and other transaction costs and may also result in taxable capital gains. Higher costs associated with increased portfolio turnover may offset gains in the Fund's performance. The Financial Highlights section of this Prospectus shows the Fund's historical turnover rates.

RISKS

Because the Fund may invest substantially all of its assets in common stocks, the main risk is the risk that the value of the stocks it holds might decrease in response to the activities of an individual company or in response to general market and/or economic conditions. If this occurs, the Fund's share price may also decrease. The Fund's performance may also be affected by risks specific to certain types of investments, such as foreign securities, derivative investments, non-investment grade bonds, initial public offerings (IPOs) or companies with relatively small market capitalizations. IPOs and other investment techniques may have a magnified performance impact on a Fund with a small asset base. A Fund may not experience similar performance as its assets grow.

The following questions and answers are designed to help you better understand some of the risks of investing in the Fund.

1. What is "industry risk"?

Industry risk is the possibility that a group of related stocks will decline in price due to industry-

specific developments. Companies in the same or similar industries may share common characteristics and are more likely to react similarly to industry-specific market or economic developments. The Fund may at times have significant exposure to industry risk as a result of investing in multiple companies in a particular industry.

2. How could the Fund's investments in foreign securities affect its performance?

Within the parameters of its specific investment policies, the Fund may invest without limit in foreign securities either indirectly (e.g., depositary receipts) or directly in foreign markets. Investments in foreign securities, including those of foreign governments, may involve greater risks than investing in domestic securities because the Fund's performance may depend on issues other than the performance of a particular company. These issues include:

- ***Currency Risk.*** As long as the Fund holds a foreign security, its value will be affected by the value of the local currency relative to the U.S. dollar. When the Fund sells a foreign denominated security, its value may be worth less in U.S. dollars even if the security increases in value in its home country. U.S. dollar denominated securities of foreign issuers may also be affected by currency risk
- ***Political and Economic Risk.*** Foreign investments may be subject to heightened political and economic risks, particularly in emerging markets which may have relatively unstable governments, immature economic structures, national policies restricting investments by foreigners, different legal sys-

tems, and economies based on only a few industries. In some countries, there is the risk that the government may take over the assets or operations of a company or that the government may impose taxes or limits on the removal of the Fund's assets from that country.

- ***Regulatory Risk.*** There may be less government supervision of foreign markets. As a result, foreign issuers may not be subject to the uniform accounting, auditing and financial reporting standards and practices applicable to domestic issuers and there may be less publicly available information about foreign issuers.

- ***Market Risk.*** Foreign securities markets, particularly those of emerging market countries, may be less liquid and more volatile than domestic markets. Certain markets may require payment for securities before delivery and delays may be encountered in settling securities transactions. In some foreign markets, there may not be protection against failure by other parties to complete transactions.

- ***Transaction Costs.*** Costs of buying, selling and holding foreign securities, including brokerage, tax and custody costs, may be higher than those involved in domestic transactions.

3. Are there special risks associated with investments in high-yield/high-risk bonds?

High-yield/high-risk bonds (or "junk" bonds) are bonds rated below investment grade by the primary rating agencies such as Standard & Poor's

and Moody's. The value of lower quality bonds generally is more dependent on credit risk, or the ability of the issuer to meet interest and principal payments, than investment grade bonds. Issuers of high-yield bonds may not be as strong financially as those issuing bonds with higher credit ratings and are more vulnerable to real or perceived economic changes, political changes or adverse developments specific to the issuer.

Please refer to the SAI for a description of bond rating categories.

4. How does the Fund try to reduce risk?

The Fund may use futures, options, swaps and other derivative instrument's to "hedge" or protect its portfolio from adverse movements in securities prices and interest rates. The Fund may also use a variety of currency hedging techniques, including forward currency contracts, to manage exchange rate risk. The. portfolio manager believes the use of these instruments will benefit the Fund. However, the Fund's performance could be worse than if the Fund had not used such instruments if the portfolio manager's judgment proves incorrect.

5. The Fund may invest in smaller or newer companies. Does this create any special risks?

Many attractive investment opportunities may be smaller, start-up companies offering emerging products or services. Smaller or newer companies may suffer more significant losses as well as realize more substantial growth than larger or more established issuers because they may lack depth of management, be unable to generate funds necessary for growth or potential develop-

ment, or be developing or marketing new products or services for which markets are not yet established and may never become established. In addition, such companies may be insignificant factors in their industries and may become subject to intense competition from larger or more established companies. Securities of smaller- or newer companies may have more limited trading markets than the markets for securities of larger or more established issuers, or may not be publicly traded at all, and may be subject to wide price fluctuations. Investments in such companies tend to be more volatile and somewhat more speculative.

Janus Mercury Fund

Shareholder's Guide

This section will help you become familiar with the different types of accounts you can establish with the Fund. It also explains how to purchase, exchange and redeem shares, as well as account policies and fees that may apply to your account. Account policies (including fees), services and features may be modified or discontinued without shareholder approval or prior notice.

JANUS

CONTACT YOUR FINANCIAL INTERMEDIARY OR PLAN SPONSOR, OR REFER TO YOUR PLAN DOCUMENTS FOR INSTRUCTIONS ON HOW TO PURCHASE, REDEEM OR EXCHANGE SHARES.

With certain limited exceptions, the Fund is available only to U.S. citizens or residents.

PRICING OF FUND SHARES

All purchases, sales and exchanges will be processed at the NAV next calculated after your request is received and accepted by the Fund (or the Fund's agent). The Fund's NAV is calculated at the close of the regular trading session of the NYSE (normally 4:00 p.m. New York time) each day that the NYSE is open. The NAV of Fund shares is not determined on days the NYSE is closed. In order to receive a day's price, your financial intermediary or plan sponsor must receive your order by the close of the regular trading session of the NYSE. Securities are valued at market value or, if a market quotation is not readily available, at their fair value determined in good faith under procedures established by and under the supervision of the Trustees. Short-term instruments maturing within 60 days are valued at amortized cost, which approximates market value.

If you hold a Fund account through a financial intermediary or plan sponsor, all purchases, exchanges, redemptions or other account activity must be processed through your financial intermediary or plan sponsor. Your financial intermediary or plan sponsor is responsible for promptly transmitting purchase, redemption and other requests to the Fund under the arrangement's made between your financial interme-

diary or plan sponsor and its customers. The Fund is not responsible for the failure of any financial intermediary or plan sponsor to carry out its obligations to its customers.

PURCHASES

Contact your financial intermediary or plan sponsor, or refer to your plan documents for information on how *to* invest in the Fund, including any minimum initial or subsequent investment requirements.

The Fund may refuse any specific purchase order, including *exchange* purchases, for any reason. For example, purchase orders may be refused if the Fund would be unable to invest the money effectively in accordance with its investment policies or would otherwise be adversely affected due to the size of the transaction, frequency of trading or other factors.

EXCHANGES

Contact your financial intermediary or plan sponsor, or consult your plan documents to exchange into *other* Funds in Janus Investment Fund. Be sure to read the prospectus of the Fund into which you are exchanging. An exchange is a taxable transaction (except for qualified plan accounts).

- You may exchange shares of the Fund only for shares of another Fund in Janus Investment Fund offered through your financial intermediary or plan sponsor.
- You must meet the minimum investment amount for each Fund.

- If you are exchanging into a closed Fund, you may be required to demonstrate eligibility to purchase shares of that Fund.
- The exchange privilege is not intended as a vehicle for short-term or excessive trading. The Fund does not permit frequent trading or market timing. Excessive exchanges of Fund shares disrupt *portfolio* management and drive Fund expenses higher. Your financial intermediary or plan sponsor may suspend or terminate your exchange privilege if you engage in an excessive pattern of exchanges.

REDEMPTIONS

Please contact your financial intermediary or plan sponsor, or refer to the appropriate plan documents for details including any restrictions on redemptions, redemption charges, redemption in kind, automatic redemption and delays in honoring-redemption requests.

Shares of the Fund-may be redeemed on any business day. Redemptions are processed at the NAV next calculated after receipt and acceptance of the redemption order by the Fund or its agent. Redemption proceeds will normally be wired to your financial intermediary or plan sponsor the business day following receipt of the redemption order, but in no event later than seven days after receipt of such order.

TAX-DEFERRED ACCOUNTS

If you are eligible and your financial intermediary or plan sponsor provides this option, you may set up one or more tax-deferred accounts. A tax-deferred account allows you to shelter your in-

vestment income and capital gains from current income taxes. A contribution to certain of these plans may also be tax deductible. Investors should consult their tax adviser or legal counsel before selecting a tax-deferred account.

EXCESSIVE TRADING POLICY

Frequent trades into or out of the Fund can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders, including long-term shareholders who do not generate these costs. The Fund is not intended for market timing or excessive trading. The Fund and its agents may reject any purchase request (including exchange purchases if permitted by your financial intermediary or plan sponsor) by any investor or group of investors indefinitely if it believes that any combination of trading activity is attributable to market timing or is otherwise excessive or potentially disruptive to the Fund. The Fund may refuse purchase orders (including exchange purchases) for any reason without prior notice, particularly orders that the Fund believes are made on behalf of market timers.

The trading history of accounts under common ownership or control may be considered in enforcing these policies. Transactions placed through the same financial intermediary or plan sponsor on an omnibus basis may be deemed part of a group for the purpose of this policy and may be rejected in whole or in part by the Fund. Transactions accepted by your financial intermediary or plan sponsor in violation of our excessive trading policy are not deemed accepted by the Fund and may be cancelled or revoked by the

Fund on the next business day following receipt by your financial intermediary or plan sponsor.

SHAREHOLDER ACCOUNT POLICIES

Transactions Through Financial Intermediaries

Fund shares purchased or sold through a financial intermediary or plan sponsor may be subject to a fee and may require different minimum initial and subsequent investments than Fund shares purchased directly from Janus. Financial intermediaries or plan sponsors may also impose other charges or restrictions different from those applicable to shareholders who invest in the Fund directly. A financial intermediary or plan sponsor, rather than its customers, may be the shareholder of record of your shares. The Fund is not responsible for the failure of any financial intermediary or plan sponsor to carry out its obligations to its customers. Certain financial intermediaries and plan sponsors may receive compensation from Janus Capital or its affiliates, and certain financial intermediaries and plan sponsors may receive compensation from the Fund for shareholder recordkeeping and similar services.

Statements and Reports

Your financial intermediary or plan sponsor will send you periodic statements of all trans- actions, as required by applicable law. The Fund distributes dividend information annually.

You will receive annual and semiannual reports including the financial statements of the Fund through your financial intermediary or plan sponsor. These reports show the Fund's invest-

ments and the market value of such investments, as well as other information about the Fund and its operations. The Trust's fiscal year ends October 31.

MANAGEMENT OF THE FUND

INVESTMENT ADVISER

Janus Capital Corporation, 100 Fillmore Street, Denver, Colorado 80206-4928, is the investment adviser to the Fund and is responsible for the day-to-day management of its investment portfolio and other business affairs of the Fund.

Janus Capital began serving as investment adviser to Janus Fund in 1970 and currently serves as investment adviser to all of the Janus funds, acts as sub-adviser for a number of private-label mutual funds and provides separate account advisory services for institutional accounts.

Janus Capital furnishes continuous advice and recommendations concerning the Fund's investments. Janus Capital also furnishes certain administrative, compliance and accounting services for the Fund, and may be reimbursed by the Fund for its costs in providing those services. In addition, Janus Capital employees serve as officers of the Trust and Janus Capital provides office space for the Fund and pays the salaries, fees and expenses of all Fund officers and those Trustees who are affiliated with Janus Capital.

MANAGEMENT EXPENSES

The Fund pays Janus Capital a management fee which is calculated daily and paid monthly. The Fund's advisory agreement spells out the man-

agement fee and other expenses that the Fund must pay. For the most recent fiscal year, the Fund paid Janus Capital a management fee of 0.65% of its average daily net assets for the period it was in operation.

The Fund incurs expenses not assumed by Janus Capital, including transfer agent and custodian fees and expenses, legal and auditing fees, printing and mailing costs of sending reports and other information to existing shareholders, and independent Trustees' fees and expenses.

Shareholders approved a new advisory agreement at a special meeting held on January 31, 2002. The Fund's new advisory agreement is the same in all material respects as the Fund's current advisory agreement and will be effective on or about March 28, 2002.

PORTFOLIO MANAGER

Warren B. Lammert

is Executive Vice President and Portfolio Manager of Janus Mercury Fund, which he has managed since inception. He is also Portfolio Manager of other Janus accounts. Mr. Lammert served as a Co-Manager of Janus Venture Fund from December 1993 to December 1996. Mr. Lammert holds a Bachelor of Arts degree in Economics from Yale University and a Master's of Science degree in Economic History from the London School of Economics. Mr. Lammert has earned the right to use the Chartered Financial Analyst designation.

OTHER INFORMATION

Size of Fund

The Fund may discontinue sales of its shares if management and the Trustees believe that continued sales may adversely affect the Fund's ability to achieve its investment objective. If sales of the Fund are discontinued, it is expected that existing plan participants and other shareholders invested in the Fund would be permitted to continue to purchase shares and to reinvest any dividends or capital gains distributions, absent highly unusual circumstances.

Distribution of the Fund

The Fund is distributed by Janus Distributors, Inc., which is a member of the National Association of Securities Dealers, Inc. ("NASD"). To obtain information about NASD member firms and their associated persons, you may contact NASD Regulation, Inc. at www.nasdr.com, or the Public Disclosure Hotline at 800-289-9999. An investor brochure containing information describing the Public Disclosure Program is available from NASD Regulation, Inc.

DISTRIBUTIONS AND TAXES

DISTRIBUTIONS

To avoid taxation of the Fund, the Internal Revenue Code requires the Fund to distribute net income and any net capital gains realized on its investments annually. The Fund's income from dividends and interest and any net realized short-term gains are paid to shareholders as ordinary income dividends. Net realized long-term

gains are paid to shareholders as capital gains distributions. Dividends and capital gains are normally declared and distributed in December.

How Distributions Affect the Fund's NAV

Distributions are paid to shareholders as of the record date of a distribution of the Fund, regardless of how long the shares have been held. Dividends and capital gains awaiting distribution are included in the Fund's daily NAV. The share price of the Fund drops by the amount of the distribution, net of any subsequent market fluctuations. As an example, assume that on December 31, Janus Mercury Fund declared a dividend in the amount of $0.25 per share. If Janus Mercury Fund's share price was $10.00 on December 30, the Fund's share price on December 31 would be $9.75, barring market fluctuations. Shareholders should be aware that distributions from a taxable mutual fund are not value-enhancing and may create income tax obligations.

"Buying a Dividend"

If you purchase shares of the Fund just before the distribution, you will pay the full price for the shares and receive a portion of the purchase price back as a taxable distribution. This is referred to as "buying a dividend." In the above example, if you bought shares on December 30, you would have paid $10.00 per share. On December 31, the Fund would pay you $0.25 per share as a dividend and your shares would now be worth $9.75 per share. Unless your account is set up as a tax-deferred account, dividends paid to you would be included in your gross income for tax purposes, even though you may not have partici-

pated in the increase in NAV of the Fund, whether or not you reinvested the dividends.

TAXES

As with any investment, you should consider the tax consequences of investing in the Fund. Any time you sell or exchange shares of a fund in a taxable account, it is considered a taxable event. Depending on the purchase price and the sale price, you may have a gain or loss on the transaction. Any tax liabilities generated by your transactions are your responsibility.

The following discussion does not apply to tax-deferred accounts, nor is it a complete analysis of the federal tax implications of investing in the Fund. You should consult your own tax adviser if you have any questions. Additionally, state or local taxes may apply to your investment, depending upon the laws of your state of residence.

Taxes on Distributions

Dividends and distributions of the Fund are subject to federal income tax, regardless of whether the distribution is made in cash or reinvested in additional shares of the Fund. Distributions may be taxable at different rates depending on the length of time the Fund holds a security. In certain states, a portion of the dividends and distributions (depending on the sources of the Fund's income) may be exempt from state and local taxes. Information regarding the tax status of income dividends and capital gains distributions will be mailed to shareholders on or before January 31st of each year. Account tax information will also be sent to the IRS.

Taxation of the Fund

Dividends, interest, and some capital gains received by the Fund on foreign securities may be subject to tax withholding or other foreign taxes. The Fund may from year to year make the election permitted under section 853 of the Internal Revenue Code to pass through such taxes to shareholders as a foreign tax credit. If such an election is not made, any foreign taxes paid or accrued will represent an expense to the Fund.

The Fund does not expect to pay federal income or excise taxes because it intends to meet certain requirements of the Internal Revenue Code. It is important that the Fund meet these requirements so that any earnings on your investment will not be taxed twice.

FINANCIAL HIGHLIGHTS

The financial highlights table is intended to help you understand the Fund's financial performance for the past 5 years through October 31st of each fiscal year shown. Items 1 through "Net asset value, end of period" reflect financial results for a single Fund share. The total returns in the table represent the rate that an investor would have earned (or lost) on an investment in the Fund (assuming reinvestment of all dividends and distributions). This information has been audited by PricewaterhouseCoopers LLP, whose report, along with Fund's financial statements, is included in the Annual Report, which is available upon request and incorporated by reference into the SAI.

Janus Mercury Fund

	Years ended October 31st				
	2001	2000	1999	1998	1997
1. Net asset value, beginning of period	$40.59	$35.65	$20.77	$18.65	$18.20
Income from investment operations:					
2. Net investment income/loss	0.04	0.03	—	(0.01)	(0.01)
3. Net gains or (losses) on securities (both realized and unrealized)	(17.05)	8.18	16.89	4.07	2.82
4. Total from investment operations	(17.01)	8.21	16.89	4.06	2.81
Less distributions:					
5. Dividends (from net investment income)	(0.03)	—	—	—	(0.09)
6. Dividends (in excess of net investment income)	—	—	—	(0.04)	—
7. Distributions (from capital gains)	—	(3.27)	(2.01)	(1.90)	(2.28)
8. Distributions (in excess of capital gains)	(4.41)	—	—	—	—
9. Total distributions	(4.44)	(3.27)	(2.01)	(1.94)	(2.36)
10. Net asset value, end of period	$19.14	$40.59	$35.65	$20.77	$18.65
11. Total return	(46.21%)	22.99%	86.02%	24.75%	17.07%
12. Net assets, end of period (in millions)	$7,910	$16,348	$9,060	$2,368	$1,971
13. Average net assets for the period (in millions)	$11,243	$15,904	$5,258	$2,103	$2,046
14. Ratio of gross expenses to average net assets	0.89%	0.89%	0.93%	0.97%	0.98%
15. Ratio of net expenses to average net assets	0.88%	0.88%	0.91%	0.94%	0.96%
16. Ratio of net investment income/(loss) to average net assets	0.16%	0.09%	(0.39%)	(0.33%)	0.21%
17. Portfolio turnover rate	83%	71%	89%	105%	157%

GLOSSARY OF INVESTMENT TERMS

This glossary provides a more detailed description of some of the types of securities, investment strategies and other instruments in which the Fund may invest. The Fund may invest in these instruments to the extent permitted by its investment objective and policies. The Fund is not limited by this discussion and may invest in any other types of instruments not precluded by the policies discussed elsewhere in this Prospectus.

I. EQUITY AND DEBT SECURITIES

Bonds are debt securities issued by a company, municipality, government or government agency. The issuer of a bond is required to pay the holder the amount of the loan (or par value of the bond)

at a specified maturity and to make scheduled interest payments.

Commercial paper is a short-term debt obligation with a maturity ranging from 1 to 270 days issued by banks, corporations and other borrowers to investors seeking to invest idle cash. The Fund may purchase commercial paper issued in private placements under Section 4(2) of the Securities Act of 1933.

Common stocks are equity securities representing shares of ownership in a company and usually carry voting rights and tan: dividends. Unlike preferred stock, dividends on common stock are not fixed but are declared at the discretion of the issuer's board of directors.

Convertible securities are preferred stocks or bonds that pay a fixed dividend or interest payment and are convertible into common stock at a specified price or conversion ratio.

Debt securities are securities representing money borrowed that must be repaid at a later date. Such securities have specific maturities and usually a specific rate of interest or an original purchase discount.

Depositary receipts are receipts for shares of a foreign-based corporation that entitle the holder to dividends and capital gains on the underlying security. Receipts include those issued by domestic banks (American Depositary Receipts), foreign banks (Global or European Depositary Receipts) and broker-dealers (depositary shares).

Equity securities generally include domestic and foreign common stocks; preferred stocks; securities convertible into common stocks or pre-

ferred stocks; warrants to purchase common or preferred stocks; and other securities with equity characteristics.

Fixed-income securities are securities that pay a specified rate of return. The term generally includes short- and long-term government, corporate and municipal obligations that pay a specified rate of interest, dividends or coupons for a specified period of time. Coupon and dividend rates may be fixed for the life of the issue or, in the case of adjustable and floating rate securities, for a shorter period.

High-yield/High-risk bonds are bonds that are rated below investment grade by the primary rating agencies (e.g., BB or lower by Standard & Poor's and Ba or lower by Moody's). Other terms commonly used to describe such bonds include "lower rated bonds," "noninvestment grade bonds" and junk bonds."

Mortgage- and asset-backed securities are shares in a pool of mortgages or other debt. These securities are generally pass-through securities, which means that principal and interest payments on the underlying securities (less servicing fees) are passed through to shareholders on a pro rata basis. These securities involve prepayment risk, which is the risk that the underlying mortgages or other debt may be refinanced or paid off prior to their maturities during periods of declining interest rates. In that case, the portfolio manager may have to reinvest the proceeds from the securities at a lower rate. Potential market gains on a security subject to prepayment risk may be more limited than potential market

gains on a comparable security that is not subject to prepayment risk.

Passive foreign investment companies (PFICs) are any foreign corporations which generate certain amounts of passive income or hold certain amounts of assets for the production of passive income. Passive income includes dividends, interest, royalties, rents and annuities. To avoid taxes and interest that the Fund must pay if these investments are profitable, the Fund may make various elections permitted by the tax laws. These elections could require that the Fund recognize taxable income, which in turn must be distributed, before the securities are sold and before cash is received to pay the distributions.

Preferred stocks are equity securities that generally pay dividends at a specified rate and have preference over common stock in the payment of dividends and liquidation. Preferred stock generally does not carry voting rights.

Rule 144A securities are securities that are not registered for sale to the general public under the securities Act of 1933, but that may be resold to certain institutional investors.

U.S. government securities include direct obligations of the U.S. government that are supported by its full faith and credit. Treasury bills have initial maturities of less than one year, Treasury notes have initial maturities of one to ten years and Treasury bonds may be issued with any maturity but generally have maturities of at least ten years. U.S. government securities also include indirect obligations of the U.S. government that are issued by federal agencies and

government sponsored entities. Unlike Treasury securities, agency securities generally are not backed by the full faith and credit of the U.S. government. Some agency securities are supported by the right of the issuer to borrow from the Treasury, others are supported by the discretionary authority of the U.S. government to purchase the agency's obligations and others are supported only by the credit of the sponsoring agency.

Variable and floating rate securities have variable or floating rates of interest and, under certain limited circumstances, may have varying principal amounts. Variable and floating rate securities pay interest at rates that are adjusted periodically according to a specified formula, usually with reference to some interest rate index or market interest rate (the "underlying index"). The floating rate tends to decrease the security's price sensitivity to changes in interest rates.

Warrants are securities, typically issued with preferred stock or bonds, that give the holder the right to buy a proportionate amount of common stock at a specified price. The specified price is usually higher than the market price at the time of issuance of the warrant. The right may last for a period of years or indefinitely.

II. FUTURES, OPTIONS AND OTHER DERIVATIVES

Forward contracts are contracts to purchase or sell a specified amount of a financial instrument for an agreed upon price at a specified time. Forward contracts are not currently exchange traded and are typically negotiated on an individual basis. The Fund may enter into forward

currency contracts to hedge against declines in the value of securities denominated in, or whose value is tied to, a currency other than the U.S. dollar or to reduce the impact of currency appreciation on purchases of such securities. It may also enter into forward contracts to purchase or sell securities or other financial indices.

Futures contracts are contracts that obligate the buyer to receive and the seller to deliver an instrument or money at a specified price on a specified date. The Fund may buy and sell futures contracts on foreign currencies, securities and financial indices including indices of U.S. government, foreign government, equity or fixed-income securities. The Fund may also buy options on futures contracts. An option on a futures contract gives the buyer the right, but not the obligation, to buy or sell a futures contract at a specified price on or before a specified date. Futures contracts and options on futures are standardized and traded on designated exchanges.

Indexed/structured securities are typically short- to intermediate-term debt securities whose value at maturity or interest rate is linked to currencies, interest rates, equity securities, indices, commodity prices or other financial indicators. Such securities may be positively or negatively indexed (i.e. their value may increase or decrease if the reference index or instrument appreciates). Indexed/structured securities may have return characteristics similar to direct investments in the underlying instruments and may be more volatile than the underlying instruments. The Fund bears the market risk of

an investment in the underlying instruments, as well as the credit risk of the issuer.

Interest rate swaps involve the exchange by two parties of their respective commitments to pay or receive interest (e.g., an exchange of floating rate payments for fixed rate payments).

Options are the right, but not the obligation, to buy or sell a specified amount of securities or other assets on or before a fixed date at a predetermined price. The Fund may purchase and write put and call options on securities, securities indices and foreign currencies.

III. OTHER INVESTMENTS, STRATEGIES AND/OR TECHNIQUES

Repurchase agreements involve the purchase of a security by the Fund and a simultaneous agreement by the seller (generally a bank or dealer) to repurchase the security from the Fund at a specified date or upon demand. This technique offers a method of earning income on idle cash. These securities involve the risk that the seller will fail to repurchase the security, as agreed. In- that case, the Fund will bear the risk of market value fluctuations until the security can be sold and may encounter delays and incur costs in liquidating the security.

Reverse repurchase agreements involve the sale of a security by the Fund to another party (generally a bank or dealer) in return for cash and an agreement by the Fund to buy the security back at a specified price and time. This technique will be used primarily to provide cash to satisfy unusually high redemption requests, or for other temporary or emergency purposes.

Short sales in which the Fund may engage may be of two types, short sales "against the box" or "naked" short sales. Short sales against the box involve selling either a security that the Fund owns, or a security equivalent in kind or amount to the security sold short that the Fund has the right to obtain, for delivery at a specified date in the future. Naked short sales involve selling a security that the Fund borrows and does not own. The Fund may enter into a short sale to hedge against anticipated declines in the market price of a security or to reduce portfolio volatility. If the value of a security sold short increases prior to the scheduled delivery date, the Fund loses the opportunity to participate in the gain. For "naked" short sales, the Fund will incur a loss if the value of a security increases during this period because it will be paying more for the security than it has received from the purchaser in the short sale and if the price declines during this period, the Fund will realize a short-term capital gain. Although the Fund's potential for gain as a result of a short sale is limited to the price at which it sold the security short less the cost of borrowing the security, its potential for loss is theoretically unlimited because there is no limit to the cost of replacing the borrowed security.

When-issued, delayed delivery and forward commitment transactions generally involve the purchase of a security with payment and delivery at some time in the future – i.e., beyond normal settlement. The Fund does not earn interest on such securities until settlement and bears the risk of market value fluctuations in between the purchase and settlement dates. New

issues of stocks and bonds, private placements and U.S. government securities may be sold in this manner.

* * *

You can request other information, including a Statement of Additional Information, Annual Report or Semiannual Report, free of charge by contacting your financial intermediary or plan sponsor. A downloadable file of the Annual Report or Semiannual Report may also be requested at janus.com. In the Fund's Annual and Semiannual Reports, you will find a discussion of the market conditions and investment strategies that significantly affected the Fund's performance during its last fiscal period. Other information is also available from financial intermediaries that sell shares of the Fund.

The Statement of Additional Information provides detailed information about the Fund and is incorporated into this Prospectus by reference. You may review and copy information about the Fund (including the Funds' Statement of Additional Information) at the Public Reference Room of the SEC or get text only copies, after paying a duplicating fee, by sending an electronic request by e-mail to publicinfo@sec.gov or by writing to or calling the Public Reference Room, Washington, D.C. 20549-0102 (1-202-942-8090). You may also obtain reports and other information about the Fund from the Electronic Data Gathering Analysis and Retrieval (EDGAR) Database on the SEC's Web site at http://www.sec.gov.

www.janus.com

100 Fillmore Street
Denver, CO 80206-4928
1-800-525-0200

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES
DISTRICT JUDGE

101 WEST LOMBARD
STREET
BALTIMORE, MD 21201
(410) 962-0782
(410) 962-2698 FAX

February 27, 2006

Memo to Counsel Re: MDL-15863, Janus Subtrack
Wiggins v. Janus Capital Group Inc., et al.,
Civil No. JFM-04-818

Dear Counsel:

I have reviewed the memoranda submitted in connection with defendants' motion to dismiss. The motion will be granted.

In ruling on the motion, my preference, of course, would be to write a formal opinion. However, my schedule simply does not permit me to do so. Therefore, in order to get these proceedings back on track, it has become necessary for me to set forth my ruling without extended analysis. Moreover, although the motion raises several difficult issues,[1] the question

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[1] One such issue is whether Janus Capital Inc and Janus Capital Management LLC may themselves be deemed to have made any statements in the Janus prospectuses. In that regard, plaintiffs' allegations here are different from those of the plaintiffs in the Janus mutual fund class action where Janus Capital and JCM are only alleged to be "control persons" of the entities who made the statements in the prospectuses. It is likewise unclear to me (despite the authorities cited by plain-

[Footnote continued on next page]

upon which my present ruling is simple and straightforward.

In *Dura Pharmaceuticals v. Broudo*, 125 S. Ct. 1627 (2005), the Supreme Court held that the allegations that plaintiffs purchased securities at "artificially inflated prices," without more, is not sufficient to establish "loss causation," as is required for recovery under the Exchange Act. *Id.* at 1629. In the present case, that is the only type of damage plaintiffs have alleged. In paragraph 125 of the amended complaint, they aver that "all purchases of Janus Capital publically traded securities during the Class Period suffered similar injury through the purchase of those securities *at artificially inflated prices* . . . ." (emphasis added).

Plaintiffs do go on to further alleged that "Janus Capita's shares began the descent that has ultimately wiped out hundreds of millions of dollars of market capitalization" the day after the Class Period ended when New York Attorney General Elliott Spitzer filed a complaint in the New York Supreme Court against Canary Partners. Compl. ¶ 91. However, the putative class is not defined to include only investors who purchased Janus Capital securities during the Class Period and who sold them after the market timing revelations were made. Rather, the definition encompasses every investor "who purchased the securities of Janus Capital between July 21, 2000 and September 2, 2003 inclusive (the 'Class Period'), and who were damaged thereby." *Id.* ¶ 19. Thus, plaintiffs' allegation of loss causation

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[Footnote continued from previous page]
tiff) whether statements made in the mutual fund prospectuses were "in connection with" the sale of Janus Capital securities.

depends solely upon their allegedly having paid "artificially inflated prices," which is precisely the type of allegation the Supreme Court found to be insufficient in *Dura Pharmaceuticals*.

For these reasons defendants' motion to dismiss will be granted. I will enter a formal order to that effect after conferring with counsel about whether plaintiffs should be granted leave to amend. Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an order.

Very truly yours,

J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES
DISTRICT JUDGE

101 WEST LOMBARD
STREET
BALTIMORE, MD 21201
(410) 962-0782
(410) 962-2698 FAX

May 30, 2006

Memo to Counsel Re: MDL-15863, Janus Subtrack
Wiggins v. Janus Capital Group Inc., et al.,
Civil No. JFM-04-818

Dear Counsel:

I have reviewed the memoranda submitted in connection with plaintiff's motion for reconsideration of the order entered March 1, 2006 or alternatively for leave to replead.

The motion will be treated as one for leave to file a second amended complaint and, as such, will be granted. The addition of the words "and who still held Janus Capital shares as of September 3, 2003" to the class definition cures the problem I identified in my letter ruling of February 27, 2006. It may be, as defendants contend, that plaintiff should have anticipated this issue prior to the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S.Ct. 1627 (2005). However, any error they made in that regard should not preclude them from pursuing inarguably meritorious claims, particularly in light of the liberality with which Fed. R. Civ. P. 15(a) must be construed. Of course, in permitting the filing of the amended complaint I am not passing upon the

other arguments that defendants have made concerning the alleged deficiencies in plaintiff's claims.

Plaintiff should formally file its second amended complaint on or before June 2, 2006. Defendants may then file a motion to dismiss it. Please confer with one another and, on or before June 9, 2006, submit to me a proposed briefing schedule on defendants' anticipated motion to dismiss.

Despite the informal nature of this letter, it should be flagged as an opinion and docketed as an order.

Very truly yours,

/s/
J. Frederick Motz
United States District Judge

OMB APPROVAL
OMB Number: 3235-0307 Expires: 03/31/04 Estimated average burden hours per response: 212.95

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form N-1A

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933
(No. 2-034393) [X]

Pre-Effective Amendment No. __ [ ]

Post-Effective Amendment No. 107 [X]

and/or

REGISTRATION STATEMENT UNDER THE INVESTMENT COMPANY ACT
OF 1940 (No. 811-1879) [X]

Amendment No. 90 [X]

(Check appropriate box or boxes.)

JANUS INVESTMENT FUND

(Exact Name of Registrant as Specified in Charter)

100 Fillmore Street, Denver, Colorado 80206-4928

Address of Principal Executive Offices (Zip Code)

Registrant's Telephone No., including Area Code: 303-333-3863

Thomas A. Early – 100 Fillmore Street, Denver, Colorado 80206-4928

(Name and Address of Agent for Service)

Approximate Date of Proposed Offering: As soon as practicable after the effective date of this Registration Statement and thereafter from day to day.

It is proposed that this filing will become effective (check appropriate box):

- [X] immediately upon filing pursuant to paragraph (b) of Rule 485
- [ ] on (date) pursuant to paragraph (b) of Rule 485
- [ ] 60 days after filing pursuant to paragraph (a)(1) of Rule 485
- [ ] on (date) pursuant to paragraph (a)(1) of Rule 485
- [ ] 75 days after filing pursuant to paragraph (a)(2) of Rule 485
- [ ] on (date) pursuant to paragraph (a)(2) of Rule 485.

If appropriate, check the following box:

- [ ] This post-effective amendment designates a new effective date for a previously filed post-effective amendment.

[Janus Letterhead]

February 28, 2003

EDGAR Operations Branch
Securities and Exchange Commission
Division of Investment Management
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: JANUS INVESTMENT FUND (the "Trust")
1933 Act File No. 2-34393
1940 Act File No. 811-1879

Dear Sir or Madam:

On behalf of the Trust, enclosed please find Post-Effective Amendment No. 107 and Amendment No. 90 under the Securities Act of 1933 (the "1933 Act") and the Investment Company Act of 1940 (the "1940 Act"), respectively, to the Trust's Registration Statement on Form N-1A (the "Amendment"). The Trust is filing the Amendment pursuant to Rule 485(b)under the 1933 Act to update the financial information of the Trust and to make certain other non-material changes.

The following Prospectuses and Statements of Additional Information ("SAIs") are included in this filing:

- Combined Open Equity Funds Prospectus (Retail Version)
- Combined Closed Equity Funds Prospectus (Retail Version)
- Combined Income Funds Prospectus (Retail Version)
- Combined Open Equity Funds Prospectus (Institutional Version)
- Combined Closed Equity Funds Prospectus (Institutional Version)

- Combined Income Funds Prospectus (Institutional Version)
- Janus Money Market Funds - Institutional Shares Prospectus
- Janus Money Market Funds - Service Shares Prospectus
- Janus Institutional Cash Reserves Fund Prospectus
- Combined Open Equity and Income Funds SAI
- Combined Closed Equity Funds SAI
- Janus Money Market Funds - Investor Shares SAI
- Janus Money Market Funds - Institutional Shares SAI
- Janus Money Market Funds - Service Shares SAI
- Janus Institutional Cash Reserves Fund SAI

All of the Prospectuses and SAIs included in the Amendment are marked to show changes made since Post-Effective Amendment No. 105 filed on December 13, 2002. As indicated on the facing page of the Amendment, the Trust has designated that the Amendment becomes effective on February 28, 2003, concurrent with Post-Effective Amendment No. 107.

Pursuant to Rule 485(b)(4) of Regulation C under the 1933 Act, I hereby confirm that the Amendment does not contain disclosures that would render it ineligible to become effective under Rule 485(b).

If you have any questions regarding this filing, please call me at (303) 316-5724.

Very truly yours,

/s/ Christine A. Malles

Christine A. Malles
Associate Counsel

Encls.

cc: Larry Greene

Kelley Abbott Howes

Bonnie M. Howe

Cindy A. Antonson

February 25, 2002
As Supplemented April 3, 2002, May 13, 2002 and May 31, 2002

Equity Funds	Income Funds
Janus Enterprise Fund	Janus Flexible Income Fund
Janus Mercury Fund	Janus Federal Tex-Exempt Fund
Janus Special Situations Fund	Janus High-Yield Fund
Janus Strategic Value Fund	Janus Short-Term Bond Fund
Janus Orion Fund	
Janus Fund 2	
Janus Global Value Fund	
Janus Core Equity Fund (Formerly Janus Equity Income Fund)	
Janus Growth and Income Fund	
Janus Balanced Fund	

Janus Equity and Income Funds
Statement of Additional Information

This Statement of Additional Information ("SAI") pertains to the Funds listed above, each of which is a separate series of Janus Investment Fund, a Massachusetts business trust. Janus Core Equity Fund was formerly known as Janus Equity Income Fund. The name change was effective July 31, 2001.

This SAI is not a Prospectus and should be read in conjunction with the Funds' Prospectuses dated February 25, 2002, and any supplements thereto, which are incorporated by reference into this SAI and may be obtained from the Trust on janus.com, by calling 1-800-525-3713, or by writing the Funds at the address shown on the back cover of this SAI. This SAI contains additional and more detailed information

about the Funds' operations and activities than the Prospectuses. The Annual and Semiannual Reports, which contain, important financial information about the Funds, are incorporated by reference into this SAI and are also available, without charge, on janus.com, by calling 1-800-525-3713, or by writing the Funds at the address shown on the back cover of this SAI.

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CLASSIFICATION, PORTFOLIO TURNOVER, INVESTMENT POLICIES AND RESTRICTIONS, AND INVESTMENT STRATEGIES AND RISKS

CLASSIFICATION

Each Fund is a series of the Trust, an open-end, management investment company. The Investment Company Act of 1940 ("1940 Act") classifies mutual funds as either diversified or nondiversified. Janus Enterprise Fund, Janus Special Situations Fund, Janus Strategic Value Fund, Janus Orion Fund and Janus Global Value Fund intend to operate in a nondiversified manner. Each of these Funds may at times, however, operate in a diversified manner if market conditions warrant. The nondiversified Funds will be operated in a manner consistent with the diversification requirements of Subchapter M of the Internal Revenue Code of 1986, as amended, and the regulations thereunder (the "Code"). Janus Mercury Fund, Janus Fund 2, Janus Core Equity Fund, Janus Growth and Income Fund, Janus Balanced Fund, Janus Flexible Income Fund, Janus Federal-Tax Exempt Fund, Janus High-Yield Fund and Janus Short-Term Bond Fund are diversified funds.

PORTFOLIO TURNOVER

For the fiscal year ended October 31, 2001, Janus Orion Fund's portfolio turnover rate varied significantly from its portfolio turnover rate for the fiscal year ended October 31, 2000 due to market and general economic conditions.

INVESTMENT POLICIES AND RESTRICTIONS APPLICABLE TO ALL FUNDS

The Funds are subject to certain fundamental policies and restrictions that may not be changed without shareholder approval. Shareholder approval means approval by the lesser of (i) more than 50% of the outstanding voting securities of the Trust (or a particular Fund if a matter affects just that Fund), or (ii) 67% or more of the voting securities present at a meeting if the holders of more than 50% of the outstanding voting securities of the Trust (or a particular Fund) are present or represented by proxy. The following policies are fundamental policies of the Funds. Each of these policies applies to all of the Funds, except policy (1), which applies only to the Funds specifically listed in that policy.

(1) With respect to 75% of its total assets, Janus Mercury Fund, Janus Fund 2, Janus Core Equity Fund, Janus Growth and Income Fund, Janus Balanced Fund, Janus Flexible Income Fund, Janus Federal Tax-Exempt Fund, Janus High-Yield Fund and Janus Short-Term Bond Fund may not purchase securities of an issuer (other than the U.S. Government, its agencies, instrumentalities or authorities or repurchase agreements collateralized by U.S. Government securities and other investment companies) if: (a) such purchase would, at the time, cause more than 5% of the Fund's total assets taken at market value to be invested in the securities of such issuer; or (b) such purchase would, at the time, result in more than 10% of the outstanding voting securities of such issuer being held by the Fund.

Each Fund may not:

(2) Invest 25% or more of the value of its total assets in any particular industry (other than U.S. government securities). This policy does not apply to Janus Federal Tax-Exempt Fund regarding municipal obligations only. For the purposes of this limitation only, industrial development bonds issued by nongovernmental users shall not be deemed to be municipal obligations. Industrial development bonds shall be classified according to the industry of the entity that has the ultimate responsibility for the payment of principal and interest on the obligation.

(3) Invest directly in real estate or interests in real estate; however, the Funds may own debt or equity securities issued by companies engaged in those businesses.

(4) Purchase or sell physical commodities unless acquired as a result of ownership of securities or other instruments (but this limitation shall not prevent the Funds from purchasing or selling foreign currencies, options, futures, swaps, forward contracts or other derivative installments or from investing in securities or other instruments backed by physical commodities).

(5) Lend any security or make any other loan if, as a result, more than 33 1/3% of the Fund's total assets would be lent to other parties (but this limitation does not apply to investments in repurchase agreements, commercial paper, debt securities or loans, including assignments and participation interests).

(6) Act as an underwriter of securities issued by others, except to the extent that the Fund may be

deemed an underwriter in connection with the disposition of portfolio securities of the Fund.

(7) Borrow money except that the Funds may borrow money for temporary or emergency purposes (not for leveraging or investment). Borrowings from banks will not, in any event, exceed one-third of the value of a Fund's total assets (including the amount borrowed). This policy shall not prohibit short sales transactions, or futures, options, swaps or forward transactions. The Funds may not issue "senior securities" in contravention of the 1940 Act.

As a fundamental policy, each Fund may, notwithstanding any other investment, policy or limitation (whether or not fundamental), invest all of its assets in the securities of a single open-end management investment company with substantially the same fundamental investment objectives, policies and limitations as such Fund.

The Trustees have adopted additional investment restrictions for the Funds. These restrictions are operating policies of the Funds and may be changed by the Trustees without shareholder approval. The additional investment restrictions adopted by the Trustees to date include the following:

(a) A Fund will not (i) enter into any futures contracts and related options for purposes other than bona fide hedging transactions within the meaning of Commodity Futures Trading Commission ("CFTC") regulations if the aggregate initial margin and premiums required to establish positions in futures contracts and related options that do not fall within the definition of bona fide hedging transactions will exceed 5% of their

fair market value of a Fund's net assets, after taking into account unrealized profits, and unrealized losses on any such contracts it has entered into; and (ii) enter into any futures contracts if the aggregate amount of such Fund's commitments under outstanding futures contracts positions would exceed the market value of its total assets.

(b) The Funds may sell securities short if they own or have the right to obtain securities equivalent in kind and amount to the securities sold short without the payment of any additional consideration therefor ("short sales against the box"). In addition, the Equity Funds may engage in "naked" short sales, which involve selling a security that a Fund borrows and does not own. The total market value of all of a Fund's naked short sale positions will not exceed 8% of its assets. Transactions in futures, options, swaps and forward contracts are not deemed to constitute selling securities short.

(c) The Funds do not currently intend to purchase securities on margin, except that the Funds may obtain such short-term credits as are necessary for the clearance of transactions, and provided that margin payments and other deposits in connection with transactions in futures, options, swaps and forward contracts shall not be deemed to constitute purchasing securities on margin.

(d) A Fund may not mortgage or pledge any securities owned or held by such Fund in amounts that exceed, in the aggregate, 15% of that Fund's net asset value, provided that this limitation does not apply to reverse repurchase agreements,

deposits of assets to margin, guarantee positions in futures, options, swaps or forward contracts, or the segregation of assets in connection with such contracts.

(e) The Funds do not currently intend to purchase any security or enter into a repurchase agreement if, as a result, more than 15% of their respective net assets would be invested in repurchase agreements not entitling the holder to payment of principals and interest within seven days and in securities that are illiquid by virtue of legal or contractual restrictions on resale or the absence of a readily available market. The Trustees, or the Funds' investment adviser acting pursuant to authority delegated by the Trustees, may determine that a readily available market exists for securities eligible for resale pursuant to Rule 144A under the Securities Act of 1933 ("Rule 144A Securities"), or any successor to such rule, Section 4(2) commercial paper and municipal lease obligations. Accordingly, such securities may not be subject to the foregoing limitation.

(f) The Funds may not invest in companies for the purpose of exercising control of management.

Under the terms of an exemptive order received from the Securities and Exchange Commission ("SEC"), each of the Funds may borrow money from or lend money to other funds that permit such transactions and for which Janus Capital Management LLC ("Janus Capital") serves as investment adviser. All such borrowing and lending will be subject to the above limits. A Fund will borrow money through the program only when the costs are equal to or lower than the cost

of bank loans. Interfund loans and borrowings normally extend overnight, but can have a maximum duration of seven days. A Fund will lend through the program only when the returns are higher than those available from other short-term instruments (such as repurchase agreements). A Fund may have to borrow from a bank at a higher interest rate if an Interfund loan is called or not renewed. Any delay in repayment to a lending Fund could result in a lost investment opportunity or additional borrowing costs.

For the purposes of these investment restrictions, the identification of the issuer of a municipal obligation depends on the terms and conditions of the security. When assets and revenues of a political subdivision are separate from those of the government that created the subdivision and the security is backed only by the assets and revenues of the subdivision, the subdivision is deemed to be the sole issuer. Similarly, in the case of an industrial development bond, if the bond is backed only by assets and revenues of a nongovernmental user, then the nongovernmental user would be deemed to be the sole issuer. If, however, in either case, the creating government or some other entity guarantees the security, the guarantee would be considered a separate security that would be treated as an issue of the guaranteeing entity.

For the purpose of each Fund's policies on investing in particular industries, the Funds will rely primarily on industry or industry group classifications published by Bloomberg L.P. To the extent that Bloomberg L.P. industry classifications are so broad that the primary economic charac-

teristics in a single industry are materially different, the Funds may further classify issuers in accordance with industry classifications as published by the SEC.

INVESTMENT POLICIES APPLICABLE TO CERTAIN FUNDS

Janus Balanced Fund. As an operational policy, at least 25% of the assets of Janus Balanced Fund normally will be invested in fixed-income senior securities.

Janus Flexible Income Fund. As a fundamental policy, this fund may not purchase a non-income-producing security if, after such purchase, less than 80% of the Fund's total assets would be invested in income-producing securities. Income-producing securities include securities that make periodic interest payments as well as those that make interest payments on a deferred basis or pay interest only at maturity (e.g., Treasury bill or zero coupon bonds).

Janus Federal Tax-Exempt Fund. As a fundamental policy, this Fund will normally invest at least 80% of its net assets in securities whose income is not subject to federal income taxes, including the alternative minimum tax.

Janus Short-Term Bond Fund. As an operational policy, under normal circumstances, this Fund expects to maintain an average weighted effective maturity of three years or less. The portfolio manager may consider estimated prepayment dates or call dates of certain securities in computing the portfolio's effective maturity.

INVESTMENT STRATEGIES AND RISKS

Cash Position

As discussed in the Prospectuses, a Fund's cash position may temporarily increase under various circumstances. Securities that the Funds may invest in as a means of receiving a return on idle cash include commercial paper, certificates of deposit, repurchase agreements or other short-term debt obligations. The Funds may also invest in money market funds, including funds managed by Janus Capital. (See "Investment Company Securities").

Illiquid Investments

Each Fund may invest up to 15% of its net assets in illiquid investments (i.e., securities that are not readily marketable). The Trustees have authorized Janus Capital to make liquidity determinations with respect to certain securities, including Rule 144A Securities, commercial paper and municipal lease obligations purchased by the Funds. Under the guidelines established by the Trustees, Janus Capital will consider the following factors: 1) the frequency of trades and quoted prices for the obligation; 2) the number of dealers willing to purchase or sell the security and the number of other potential purchasers; 3) the willingness of dealers to undertake to make a market in the security; and 4) the nature of the security and the nature of marketplace trades, including the time needed to dispose of the security, the method of soliciting offers and the mechanics of the transfer. In the case of commercial paper, Janus Capital will also consider whether the paper is traded flat or in default as to principal and interest and any ratings of the paper by

a nationally recognized statistical rating organization ("NRSRO"). A foreign security that may be freely traded on or through the facilities of an offshore exchange or other established offshore securities market is not deemed to be a restricted security subject to these procedures.

If illiquid securities exceed 15% of a Fund's net assets after the time of purchase the Fund will take steps to reduce in an orderly fashion its holdings of illiquid securities. Because illiquid securities may not be readily marketable, a portfolio manager may not be able to dispose of them in a timely manner. As a result, a Fund may be forced to hold illiquid securities while their price depreciates. Depreciation in the price of illiquid securities may cause the net asset value of a Fund to decline.

Each of the Funds may invest up to 5% of its total assets in venture capital investments, although no more than 0.5% of its total assets will be invested in any one venture capital company. Venture capital investments are investments in new and early stage companies whose securities are not publicly traded. These investments may present significant opportunities for capital appreciation but involve a high degree of risk that can result in substantial losses. The Funds may not be able to sell such investments when a portfolio manager deems it appropriate to do so due to restrictions on their sale. In addition, the Funds may be forced to sell their venture capital investments at less than fair market value. Where venture capital investments must be registered prior to their sale, the Funds may be obligated to pay all or part of the registration ex-

penses. Any of these situations may result in a decrease in a Fund's NAV.

Securities Lending

Under procedures adopted by the Trustees, the Funds may lend securities to qualified parties (typically brokers or other financial institutions) who need to borrow securities in order to complete certain transactions such as covering short sales, avoiding failures to deliver securities or completing arbitrage activities. The Funds may seek to earn additional income through securities lending. Since there is the risk of delay in recovering a loaned security or the risk of loss in collateral rights if the borrower fails financially, securities lending will only be made to parties that Janus Capital deems creditworthy and in good standing. In addition, such loans will only be made if Janus Capital believes the benefit from granting such loans justifies the risk. The Funds will not have the right to vote on securities while they are being lent, but it will generally call a loan in anticipation of any important vote. All loans will be continuously secured by collateral which consists of cash, U.S. government securities, letters of credit and such other collateral permitted by the SEC. Cash collateral may be invested in money market funds advised by Janus to the extent consistent with exemptive relief obtained from the SEC.

Foreign Securities

Within the parameters of its specific investment policies, each Fund may invest without limit in foreign securities either indirectly (e.g., depositary receipts) or directly in foreign markets. Investments in foreign securities, including those

of foreign governments, may involve greater risks than investing in domestic securities, because the Funds' performance may depend on issues other than the performance of a particular company. These issues include:

Currency Risk. As long as a Fund holds a foreign security, its value will be affected by the value of the local currency relative to the U.S. dollar. When a Fund sells a foreign denominated security, its value may be worth less in U.S. dollars even if the security increases in value in its home country. U.S. dollar denominated securities of foreign issuers may also be affected by currency risk.

Political and Economic Risk. Foreign investments may be subject to heightened political and economic risks, particularly in emerging markets which may have relatively unstable governments, immature economic structures, national policies restricting investments by foreigners, different legal systems, and economies based on only a few industries. In some countries, there is the risk that the government may take over the assets or operations of a company or that the government may impose taxes or limits on the removal of a Fund's assets from that country.

Regulatory Risk. There may be less government supervision of foreign markets. As a result, foreign issuers may not be subject to the uniform accounting, auditing and financial reporting standards and practices applicable to domestic issuers and there may be less publicly available information about foreign issuers.

Market Risk. Foreign securities markets, particularly those of emerging market countries, may be less liquid and more volatile than domestic markets. Certain markets may require payment for securities before delivery and delays may be encountered in settling securities transactions. In some foreign markets, there may not be protection against failure by other parties to complete transactions.

Transaction Costs. Costs of buying, selling and holding foreign securities, including brokerage, tax and custody costs, may be higher than those involved in domestic transactions.

Short Sales

Each Fund may engage in "short sales against the box." This technique involves selling either a security that a Fund owns, or a security equivalent in kind and amount to the security sold short that the Fund has the right to obtain, for delivery at a specified date in the future. A Fund may enter into a short sale against the box to hedge against anticipated declines in the market price of portfolio securities. If the value of the securities sold short increases prior to the scheduled delivery date, a Fund loses the opportunity to participate in the gain.

The Equity Funds may also engage in "naked" short sales. In a naked short sale transaction, a Fund sells a security it does not own to a purchaser at a specified price. To complete a naked short sale, a Fund must: (1) borrow the security to deliver it to the purchaser and (2) buy that same security in the market to return it to the lender. A Fund may sell securities short only on a fully collateralized basis, as permitted by SEC

interpretations. At the time of a short sale, a Fund will establish and maintain a segregated account consisting of liquid assets equal in value to the purchase price due on the settlement date under the short sale period. The value of the liquid assets will be marked to market daily. A Fund will engage in naked short sales when a portfolio manager anticipates that the security's market purchase price will be less than its borrowing price. Naked short sales involve the same fundamental risk as short sales against the box, as described in the previous paragraph. In addition, naked short sales carry risks of loss if the value of a security sold short increases prior to the scheduled delivery date and a Fund must pay more for the security than it has received from the purchaser in the short sale. The total market value of all of a Fund's naked short sale positions will not exceed 8% of its assets.

Zero Coupon, Step Coupon and Pay-In-Kind Securities

Each Fund may invest up to 10% (without limit for Janus High-Yield Fund and Janus Flexible Income Fund) of its assets in zero coupon, pay-in-kind and step coupon securities. Zero coupon bonds are issued and traded at a discount from their face value. They do not entitle the holder to any periodic payment of interest prior to maturity. Step coupon bonds trade at a discount from their face value and pay coupon interest. The coupon rate is low for an initial period and then increases to a higher coupon rate thereafter. The discount from the face amount or par value depends on the time remaining until cash payments begin, prevailing interest rates, liquidity

of the security and the perceived credit quality of the issuer. Pay-in-kind bonds normally give the issuer an option to pay cash at a coupon payment date or give the holder of the security a similar bond with the same coupon rate and a face value equal to the amount of the coupon payment that would have been made. For the purposes of any Fund's restriction on investing in income-producing securities, income-producing securities include securities that make periodic interest payments as well as those that make interest payments on a deferred basis or pay interest only at maturity (e.g., Treasury bills or zero coupon bonds).

Current federal income tax law requires holders of zero coupon and step coupon securities to report the portion of the original issue discount on such securities that accrues during a given year as interest income, even though the holders receive no cash payments of interest during the year. In order to qualify as a "regulated investment company" under the Code, a Fund must distribute its investment company taxable income, including the original issue discount accrued on zero coupon or step coupon bonds. Because a Fund will not receive cash payments on a current basis in respect of accrued original-issue discount on zero coupon bonds or step coupon bonds during the period before interest payments begin, in some years that Fund may have to distribute cash obtained from other sources in order to satisfy the distribution requirements under the Code. A Fund might obtain such cash from selling other portfolio holdings which might cause the Fund to incur capital gains or losses on the sale. Additionally, these actions are likely to

reduce the assets to which Fund expenses could be allocated and to reduce the rate of return for the Fund. In some circumstances, such sales might be necessary in order to satisfy cash distribution requirements even though investment considerations might otherwise make it undesirable for a Fund to sell the securities at the time.

Generally, the market prices of zero coupon, step coupon and pay-in-kind securities are more volatile than the prices of securities that pay interest periodically and in cash and are likely to respond to changes in interest rates to a greater degree than other types of debt securities having similar maturities and credit quality.

Pass-Through Securities

The Funds may invest in various types of pass-through securities, such as mortgage-backed securities, asset-backed securities and participation interests. A pass-through security is a share or certificate of interest in a pool of debt obligations that have been repackaged by an intermediary, such as a bank or broker-dealer. The purchaser of a pass-through security receives an undivided interest in the underlying pool of securities. The issuers of the underlying securities make interest and principal payments to the intermediary which are passed through to purchasers, such as the Funds. The most common type of pass-through securities are mortgage-backed securities. Ginnie Mae Certificates are mortgage-backed securities that evidence an undivided interest in a pool of mortgage loans. Ginnie Mae Certificates differ from bonds in that principal is paid back monthly by the borrowers over the term of the loan rather than returned in

a lump sum at maturity. A Fund will generally purchase "modified pass-through" Ginnie Mae Certificates, which entitle the holder to receive a share of all interest and principal payments paid and owned on the mortgage pool, net of fees paid to the "issuer" and Ginnie Mae, regardless of whether or not the mortgagor actually makes the payment. Ginnie Mae Certificates are backed as to the timely payment of principal and interest by the full faith and credit of the U.S. government.

Freddie Mac issues two types of mortgage pass-through securities: mortgage participation certificates ("PCs") and guaranteed mortgage certificates ("GMCs"). PCs resemble Ginnie Mae Certificates in that each PC represents a pro rata share of all interest and principal payments made and owned on the underlying pool. Freddie Mac guarantees timely payments of interest on PCs and the full return of principal. GMCs also represent a pro rata interest in a pool of mortgages. However, these instruments pay interest semiannually and return principal once a year in guaranteed minimum payments. This type of security is guaranteed by Freddie Mac as to timely payment of principal and interest but it is not guaranteed by the full faith and credit of the U.S. government.

Fannie Mae issues guaranteed mortgage pass-through certificates ("Fannie Mae Certificates"). Fannie Mae Certificates resemble Ginnie Mae Certificates in that each Fannie Mae Certificate represents a pro rata share of all interest and principal payments made and owned on the underlying pool. This type of security is guaranteed

by Fannie Mae as to timely payment of principal and interest but it is not guaranteed by the full faith and credit of the U.S. government.

Except for GMCs, each of the mortgage-backed securities described above is characterized by monthly payments to the holder, reflecting the monthly payments made by the borrowers who received the underlying mortgage loans. The payments to the security holders (such as the Funds), like the payments on the underlying loans, represent both principal and interest. Although the underlying mortgage loans are for specified periods of time, such as 20 or 30 years, the borrowers can, and typically do, pay them off sooner. Thus, the security holders frequently receive prepayments of principal in addition to the principal that is part of the regular monthly payments. A portfolio manager will consider estimated prepayment rates in calculating the average weighted maturity of a Fund. A borrower is more likely to prepay a mortgage that bears a relatively high rate of interest. This means that in times of declining interest rates, higher yielding mortgage-backed securities held by a Fund might be converted to cash and that Fund will be forced to accept lower interest rates when that cash is used to purchase additional securities in the mortgage-backed securities sector or in other investment sectors. Additionally, prepayments during such periods will limit a Fund's ability to participate in as large a market gain as may be experienced with a comparable security not subject to prepayment.

Asset-backed securities represent interests in pools of consumer loans and are backed by paper

or accounts receivables originated by banks, credit card companies or other providers of credit. Generally, the originating bank or credit provider is neither the obligor nor the guarantor of the security, and interest and principal payments ultimately depend upon payment of the underlying loans by individuals. Tax-exempt asset-backed securities include units of beneficial interests in pools of purchase contracts, financing leases, and sales agreements that may be created when a municipality enters into an installment purchase contract or lease with a vendor. Such securities may be secured by the assets purchased or leased by the municipality; however, if the municipality stops making payments, there generally will be no recourse against the vendor. These obligations are likely to involve unscheduled prepayments of principal.

Investment Company Securities

From time to time, the Funds may invest in securities of other investment companies, subject to the provisions of Section 12(d)(1) of the 1940 Act. The Funds may invest in securities of money market funds managed by Janus Capital in excess of the limitations of Section 12(d)(1) under the terms of an SEC exemptive order obtained by Janus Capital and the Janus funds.

Depositary Receipts

The Funds may invest in sponsored and unsponsored American Depositary Receipts ("ADRs"), which are receipts issued by an American bank or trust company evidencing ownership of underlying securities issued by a foreign issuer. ADRs, in registered form, are designed for use in U.S. securities markets. Unsponsored ADRs may be

created without the participation of the foreign issuer. Holders of these ADRs generally bear all the costs of the ADR facility, whereas foreign issuers typically bear certain costs in a sponsored ADR. The bank or trust company depositary of an unsponsored ADR may be under no obligation to distribute shareholder communications received from the foreign issuer or to pass through voting rights. The Funds may also invest in European Depositary Receipts ("EDRs"), Global Depositary Receipts ("GDRs") and in other similar instruments representing securities of foreign companies. EDRs and GDRs are securities that are typically issued by foreign banks or foreign trust companies, although U.S. banks or U.S. trust companies may issue them. EDRs and GDRs are structured similar to the arrangements of ADRs. EDRs, in bearer form, are designed for use in European securities markets.

Depositary Receipts are generally subject to the same sort of risks as direct investments in a foreign country, such as, currency risk, political and economic risk, and market risk, because their values depend on the performance of a foreign security denominated in its home currency. The risks of foreign investing are addressed in some detail in the Funds' prospectuses.

Municipal Obligations

The Funds may invest in municipal obligations issued by states, territories and possessions of the United States and the District of Columbia. Janus Federal Tax-Exempt Fund may, at times, invest more than 25% of the value of its assets in industrial development bonds, a type of revenue bond which, although issued by a public author-

ity, may be backed only by the credit and security of a private issuer, thus presenting a greater credit risk.

The value of municipal obligations can be affected by changes in their actual or perceived credit quality. The credit quality of municipal obligations can be affected by among other things the financial condition of the issuer or guarantor, the issuer's future borrowing plans and sources of revenue, the economic feasibility of the revenue bond project or general borrowing purpose, political or economic developments in the region where the security is issued, and the liquidity of the security. Because municipal securities are generally traded over-the-counter, the liquidity of a particular issue often depends on the willingness of dealers to make a market in the security. The liquidity of some municipal obligations may be enhanced by demand features, which would enable a Fund to demand payment on short notice from the issuer or a financial intermediary.

Other Income-Producing Securities

Other types of income producing securities that the Funds may purchase include, but are not limited to, the following types of securities:

Variable and floating rate obligations. These types of securities have variable or floating rates of interest and, under certain limited circumstances, may have varying principal amounts. Variable and floating rate securities pay interest at rates that are adjusted periodically according to a specified formula, usually with reference to some interest rate index or market interest rate (the "underlying index").

The floating rate tends to decrease the security's price sensitivity to changes in interest rates.

In order to most effectively use these investments, a portfolio manager must correctly assess probable movements in interest rates. This involves different skills than those used to select most portfolio securities. If the portfolio manager incorrectly forecasts such movements, a Fund could be adversely affected by the use of variable or floating rate obligations.

Standby commitments. These instruments, which are similar to a put, give a Fund the option to obligate a broker, dealer or bank to repurchase a security held by that Fund at a specified price.

Tender option bonds. Tender option bonds are relatively long-term bonds that are coupled with the option to tender the securities to a bank, broker-dealer or other financial institution at periodic intervals and receive the face value of the bond. This investment structure is commonly used as a means of enhancing a security's liquidity.

Inverse Floaters. Inverse floaters are debt instruments whose interest bears an inverse relationship to the interest rate on another security. No Fund will invest more than 5% of its assets in inverse floaters. Similar to variable and floating rate obligations, effective use of inverse floaters requires skills different from those needed to select most portfolio securities. If movements in interest rates are incorrectly anticipated, a Fund could lose money or its NAV could decline by the use of inverse floaters.

Strip bonds. Strip bonds are debt securities that are stripped of their interest (usually by a financial intermediary) after the securities are issued. The market value of these securities generally fluctuates more in response to changes in interest rates than interest-paying securities of comparable maturity.

The Funds will purchase standby commitments, tender option bonds and instruments with demand features primarily for the purpose of increasing the liquidity of their portfolios.

Repurchase and Reverse Repurchase Agreements

In a repurchase agreement, a Fund purchases a security and simultaneously commits to resell that security to the seller at an agreed upon price on an agreed upon date within a number of days (usually not more than seven) from the date of purchase. The resale price consists of the purchase price plus an agreed upon incremental amount that is unrelated to the coupon rate or maturity of the purchased security. A repurchase agreement involves the obligation of the seller to pay the agreed upon price, which obligation is in effect secured by the value (at least equal to the amount of the agreed upon resale price and marked-to-market daily) of the underlying security or "collateral." A risk associated with repurchase agreements is the failure of the seller to repurchase the securities as agreed, which may cause a Fund to suffer a loss if the market value of such securities declines before they can be liquidated on the open market. In the event of bankruptcy or insolvency of the seller, a Fund may encounter delays and incur costs in liquidating the underlying security. Re-

purchase agreements that mature in more than seven days are subject to the 15% limit on illiquid investments. While it is not possible to eliminate all risks from these transactions, it is the policy of the Funds to limit repurchase agreements to those parties whose creditworthiness has been reviewed and found satisfactory by Janus Capital.

A Fund may use reverse repurchase agreements to obtain cash to satisfy unusually heavy redemption requests or for other temporary or emergency purposes without the necessity of selling portfolio securities, or to earn additional income on portfolio securities, such as Treasury bills or notes. In a reverse repurchase agreement, a Fund sells a portfolio security to another party, such as a bank or broker-dealer, in return for cash and agrees to repurchase the instrument at a particular price and time. While a reverse repurchase agreement is outstanding, a Fund will maintain cash and appropriate liquid assets in a segregated custodial account to cover its obligation under, the agreement. The Funds will enter into reverse repurchase agreements only with parties that Janus Capital deems creditworthy. Using reverse repurchase agreements to earn additional income involves the risk that the interest earned on the invested proceeds is less than the expense of the reverse repurchase agreement transaction. This technique may also have a leveraging effect on the Fund's portfolio, although the Fund's intent to segregate assets in the amount of the reverse repurchase agreement minimizes this effect.

High-Yield/High-Risk Bonds

Janus Flexible Income Fund and Janus High-Yield Fund may invest without limit in bonds that are rated below investment grade (e.g., bonds rated BB or lower by Standard & Poor's Ratings Services or Ba or lower by Moody's Investors Service, Inc.). Within the parameters of its specific investment policies, no other Fund intends to invest 35% or more of its net assets in such bonds, except Janus Core Equity Fund will, under normal circumstances, limit its investment in such bonds to 20% of its net assets. Lower rated bonds involve a higher degree of credit risk, which is the risk that the issuer will not make interest or principal payments when due. In the event of an unanticipated default, a Fund would experience a reduction in its income, and could expect a decline in the market value of the bonds so affected.

Any Fund may also invest in unrated bonds of foreign and domestic issuers. For the Funds subject to such limit, unrated bonds will be included in each Fund's limit on investments in bonds rated below investment grade unless its portfolio manager deems such securities to be the equivalent of investment grade bonds. Unrated bonds, while not necessarily of lower quality than rated bonds, may not have as broad a market. Because of the size and perceived demand of the issue, among other factors, certain municipalities may not incur the costs of obtaining a rating. A Fund's portfolio manager will analyze the creditworthiness of the issuer, as well as any financial institution or other party responsible for

payments on the bond, in determining whether to purchase unrated municipal bonds.

Defaulted Securities

A Fund will invest in defaulted securities only when its portfolio manager believes, based upon his or her analysis of the financial condition, results of operations and economic outlook of an issuer, that there is potential for resumption of income payments and that the securities offer an unusual opportunity for capital appreciation. For the Funds subject to such limit, defaulted securities will be included in each Fund's limit on investments in bonds rated below investment grade. Notwithstanding the portfolio manager's belief about the resumption of income, however, the purchase of any security on which payment of interest or dividends is suspended involves a high degree of risk. Such risk includes, among other things, the following:

Financial and Market Risks. Investments in securities that are in default involve a high degree of financial and market risks that can result in substantial or, at times, even total losses. Issuers of defaulted securities may have substantial capital needs and may become involved in bankruptcy or reorganization proceedings. Among the problems involved in investments in such issuers is the fact that it may be difficult to obtain information about the condition of such issuers. The market prices of such securities also are subject to abrupt and erratic movements and above average price volatility, and the spread between the bid and asked prices of such securities may be greater than normally expected.

Disposition of Portfolio Securities. Although these Funds generally will purchase securities for which their portfolio managers expect an active market to be maintained, defaulted securities may be less actively traded than other securities and it may be difficult to dispose of substantial holdings of such securities at prevailing market prices. The Funds will limit holdings of any such securities to amounts that the portfolio managers believe could be readily sold, and holdings of such securities would, in any event, be limited so as not to limit the Funds' ability to readily dispose of securities to meet redemptions.

Other. Defaulted securities require active monitoring and may, at times, require participation in bankruptcy or receivership proceedings on behalf of the Funds.

Futures, Options and Other Derivative Instruments

Futures Contracts. The Funds may enter into contracts for the purchase or sale for future delivery of equity securities, fixed-income securities, foreign currencies or contracts based on financial indices, including indices of U.S. government securities, foreign government securities, equity or fixed-income securities. U.S. futures contracts are traded on exchanges which have been designated "contract markets" by the CFTC and must be executed through a futures commission merchant ("FCM"), or brokerage firm, which is a member of the relevant contract market. Through their clearing corporations, the exchanges guarantee performance of the contracts as between the clearing members of the exchange.

The buyer or seller of a futures contract is not required to deliver or pay for the underlying instrument unless the contract is held until the delivery date. However, both the buyer and seller are required to deposit "initial margin" for the benefit of the FCM when the contract is entered into. Initial margin deposits are equal to a percentage of the contract's value, as set by the exchange on which the contract is traded, and may be maintained in cash or certain other liquid assets by the Funds' custodian for the benefit of the FCM. Initial margin payments are similar to good faith deposits or performance bonds. Unlike margin extended by a securities broker, initial margin payments do not constitute purchasing securities on margin for purposes of the Fund's investment limitations. If the value of either party's position declines, that party will be required to make additional "variation margin" payments for the benefit of the FCM to settle the change in value on a daily basis. The party that has a gain may be entitled to receive all or a portion of this amount. In the event of the bankruptcy of the FCM that holds margin on behalf of a Fund, that Fund may be entitled to return of margin owed to such Fund only in proportion to the amount received by the FCM's other customers. Janus Capital will attempt to minimize the risk by careful monitoring of the creditworthiness of the FCMs with which the Funds do business and by depositing margin payments in a segregated account with the Funds' custodian.

The Funds intend to comply with guidelines of eligibility for exclusion from the definition of the term "commodity pool operator" adopted by the CFTC and the National Futures Association,

which regulate trading in the futures markets. The Funds will use futures contracts and related options primarily for bona fide hedging purposes within the meaning of CFTC regulations. To the extent that the Funds hold positions in futures contracts and related options that do not fall within the definition of bona fide hedging transactions, the aggregate initial margin and premiums required to establish such positions will not exceed 5% of the fair market value of a Fund's net assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into.

Although a Fund will segregate cash and liquid assets in an amount sufficient to cover its open futures obligations, the segregated assets would be available to that Fund immediately upon closing out the futures position, while settlement of securities transactions could take several days. However, because a Fund's cash that may otherwise be invested would be held uninvested or invested in other liquid assets so long as the futures position remains open, such Fund's return could be diminished due to the opportunity losses of foregoing other potential investments.

A Fund's primary purpose in entering into futures contracts is to protect that Fund from fluctuations in the value of individual securities or the securities markets generally, or interest rates without actually buying or selling the underlying debt or equity security. For example, if the Fund anticipates an increase in the price or stocks, and it intends to purchase stocks at a later time, that Fund could enter into a futures contract to purchase a stock index as a tempo-

rary substitute for stock purchases. If an increase in the market occurs that influences the stock index as anticipated, the value of the futures contracts will increase, thereby serving as a hedge against that Fund not participating in a market advance. This technique is sometimes known as an anticipatory hedge. A Fund may also use this technique with respect to an individual company's stock. To the extent a Fund enters into futures contracts for this purpose, the segregated assets maintained to cover such Fund's obligations with respect to the futures contracts will consist of other liquid assets from its portfolio in an amount equal to the difference between the contract price and the aggregate value of the initial and variation margin payments made by that Fund with respect to the futures contracts. Conversely, if a Fund holds stocks and seeks to protect itself from a decrease in stock prices, the Fund might sell stock index futures contracts, thereby hoping to offset the potential decline in the value of its portfolio securities by a corresponding increase in the value of the futures contract position. Similarly, if a Fund holds an individual company's stock and expects the price of that stock to decline, the Fund may sell a futures contract on that stock in hopes of offsetting the potential decline in the company's stock price. A Fund could protect against a decline in stock prices by selling portfolio securities and investing in money market instruments, but the use of futures contracts enables it to maintain a defensive position without having to sell portfolio securities.

If a Fund owns bonds and the portfolio manager expects interest rates to increase, that Fund may

take a short position in interest rate futures contracts. Taking such a position would have much the same effect as that Fund selling bonds in its portfolio. If interest rates increase as anticipated, the value of the bonds would decline, but the value of that Fund's interest rate futures contract will increase, thereby keeping the net asset value of that Fund from declining as much as it may have otherwise. If, on the other hand, a portfolio manager expects interest rates to decline, that Fund may take a long position in interest rate futures contracts in anticipation of later closing out the futures position and purchasing the bonds. Although a Fund can accomplish similar results by buying securities with long maturities and selling securities with short maturities, given the greater liquidity of the futures market than the cash market, it may be possible to accomplish the same result more easily and more quickly by using futures contracts as an investment tool to reduce risk.

The ordinary spreads between prices in the cash and futures markets, due to differences in the nature of those markets, are subject to distortions. First, all participants in the futures market are subject to initial margin and variation margin requirements. Rather than meeting additional variation margin requirements, investors may close out futures contracts through offsetting transactions which could distort the normal price relationship between the cash and futures markets. Second, the liquidity of the futures market depends on participants entering into offsetting transactions rather than making or taking delivery of the instrument underlying a futures contract. To the extent participants de-

cide to make or take delivery, liquidity in the futures market could be reduced and prices in the futures market distorted. Third, from the point of view of speculators, the margin deposit requirements in the futures market are less onerous than margin requirements in the securities market. Therefore, increased participation by speculators in the futures market may cause temporary price distortions. Due to the possibility of the foregoing distortions, a correct forecast of general price trends by a portfolio manager still may not result in a successful use of futures.

Futures contracts entail risks. Although the Funds believe that use of such contracts will benefit the Funds, a Fund's overall performance could be worse than if such Fund had not entered into futures contracts if the portfolio manager's investment judgement proves incorrect. For example, if a Fund has hedged against the effects of a possible decrease in prices of securities held in its portfolio and prices increase instead, that Fund will lose part or all of the benefit of the increased value of these securities because of offsetting losses in its futures positions. This risk may be magnified for single stock futures transactions, as the Fund's portfolio manager must predict the direction of the price of an individual stock, as, opposed to securities prices generally. In addition, if a Fund has insufficient cash, it may have to sell securities from its portfolio to meet daily variation margin requirements. Those sales may be, but will not necessarily be, at increased prices which reflect the rising market and may occur at a time when the sales are disadvantageous to such Fund.

The prices of futures contracts depend primarily on the value of their underlying instruments. Because there are a limited number of types of futures contracts, it is possible that the standardized futures contracts available to a Fund will not match exactly such Fund's current or potential investments. A Fund may buy and sell futures contracts based on underlying instruments with different characteristics from the securities in which it typically invests-for example, by hedging investments in portfolio securities with a futures contract based on a broad index of securities—which involves a risk that the futures position will not correlate precisely with the performance of such Fund's investments.

Futures prices can also diverge from the prices of their underlying instruments, even if the underlying instruments closely correlate with a Fund's investments, such as with a single stock futures contract. Futures prices are affected by factors such as current and anticipated short-term interest rates, changes in volatility of the underlying instruments and the time remaining until expiration of the contract. Those factors may affect securities prices differently from futures prices. Imperfect correlations between a Fund's investments and its futures positions also may result from differing levels of demand in the futures markets and the securities markets, from structural differences in how futures and securities are traded, and from imposition of daily price fluctuation limits for futures contracts. A Fund may buy or sell futures contracts with a greater or lesser value than the securities it wishes to hedge or is considering purchasing in order to attempt to compensate for differences in historical

volatility between the futures contract and the securities, although this may not be successful in all cases if price changes in a Fund's futures positions are poorly correlated with its other investments, its futures positions may fail to produce desired gains or result in losses that are not offset by the gains in that Fund's other investments.

Because futures contracts are generally settled within a day from the date they are closed out, compared with a settlement period of three days for some types of securities, the futures markets can provide superior liquidity to the securities markets. Nevertheless, there is no assurance that a liquid secondary market will exist for any particular futures contract at any particular time. In addition, futures exchanges may establish daily price fluctuation limits for futures contracts and may halt trading if a contract's price moves upward or downward more than the limit in a given day. On volatile trading days when the price fluctuation limit is reached, it may be impossible for a Fund to enter into new positions or close out existing positions. If the secondary market for a futures contract is not liquid because of price fluctuation limits or otherwise, a Fund may not be able to promptly liquidate unfavorable futures positions and potentially could be required to continue to hold a futures position until the delivery date, regardless of changes in its value. As a result, such Fund's access to other assets held to cover its futures positions also could be impaired.

Options on Futures Contracts. The Funds may buy and write put and call options on fu-

tures contracts. An option on a future gives a Fund the right (but not the obligation) to buy or sell a futures contract at a specified price on or before a specified date. The purchase of a call option on a futures contract is similar in some respects to the purchase of a call option on an individual security. Depending on the pricing of the option compared to either the price of the futures contract upon which it is based or the price of the underlying instrument, ownership of the option may or may not be less risky than ownership of the futures contract or the underlying instrument. As with the purchase of futures contracts, when a Fund is not fully invested it may buy a call option on a futures contract to hedge against a market advance.

The writing of a call option on a futures contract constitutes a partial hedge against declining prices of the security or foreign currency which is deliverable under, or of the index comprising, the futures contract. If the futures' price at the expiration of the option is below the exercise price, a Fund will retain the full amount of the option premium which provides a partial hedge against any decline that may have occurred in that Fund's portfolio holdings. The writing of a put option on a futures contract constitutes a partial hedge against increasing prices of the security or foreign currency which is deliverable under, or of the index comprising, the futures contract. If the futures' price at expiration of the option is higher than the exercise price, a Fund will retain the full amount of the option premium which provides a partial hedge against any increase in the price of securities which that Fund is considering buying. If a call or put option a Fund has written

is exercised, such Fund will incur a loss which will be reduced by the amount of the premium it received. Depending on the degree of correlation between the change in the value of its portfolio securities and changes in the value of the futures positions, a Fund's losses from existing options on futures may to some extent be reduced or increased by changes in the value of portfolio securities.

The purchase of a put option on a futures contract is similar in some respects to the purchase of protective put options on portfolio securities. For example, a Fund may buy a put option on a futures contract to hedge its portfolio against the risk of falling prices or rising interest rates.

The amount of risk a Fund assumes when it buys an option on a futures contract is the premium paid for the option plus related transaction costs. In addition to the correlation risks discussed above, the purchase of an option also entails the risk that changes in the value of the underlying futures contract will not be fully, reflected in the value of the options bought.

Forward Contracts. A forward contract is an agreement between two parties in which one party is obligated to deliver a stated amount of a stated asset at a specified time in the future and the other party is obligated to pay a specified amount for the assets at the time of delivery. The Funds may enter into forward contracts to purchase and sell government securities, equity or income securities, foreign currencies or other financial instruments. Forward contracts generally are traded in an interbank market conducted directly between traders (usually large commer-

cial banks) and their customers. Unlike futures contracts, which are standardized contracts, forward contracts can be specifically drawn to meet the needs of the parties that enter into them. The parties to a forward contract may agree to offset or terminate the contract before its maturity, or may hold the contract to maturity and complete the contemplated exchange.

The following discussion summarizes the Funds' principal uses of forward foreign currency exchange contracts ("forward currency contracts"). A Fund may enter into forward currency contracts with stated contract values of up to the value of that Fund's' assets. A forward currency contract is an obligation to buy or sell an amount of a specified currency for an agreed price (which may be in U.S. dollars or a foreign currency). A Fund will exchange foreign currencies for U.S. dollars and for other foreign currencies in the normal course of business and may buy and sell currencies through forward currency contracts in order to fix a price for securities it has agreed to buy or sell ("transaction hedge"). A Fund also may hedge some or all of its investments denominated in a foreign currency or exposed to foreign currency fluctuations against a decline in the value of that currency relative to the U.S. dollar by entering into forward currency contracts to sell an amount of that currency (or a proxy currency whose performance is expected to replicate or exceed the performance of that currency relative to the U.S. dollar) approximating the value of some or all of its portfolio securities denominated in that currency ("position hedge") or by participating in options or futures contracts with respect to the currency. A Fund also may

enter into a forward currency contract with respect to a currency where the Fund is considering the purchase or sale of investments denominated in that currency but has not yet selected the specific investments ("anticipatory hedge"). In any of these circumstances a Fund may, alternatively, enter into a forward currency contract to purchase or sell one foreign currency for a second currency that is expected to perform more favorably relative to the U.S. dollar if the portfolio manager believes there is a reasonable degree of correlation between movements in the two currencies ("cross-hedge").

These types of hedging minimize the effect of currency appreciation as well as depreciation, but do not eliminate fluctuations in the underlying U.S. dollar equivalent value of the proceeds of or rates of return on a Fund's foreign currency denominated portfolio securities. The matching of the increase in value of a forward contract and the decline in the U.S. dollar equivalent value of the foreign currency denominated asset that is the subject of the hedge generally will not be precise. Shifting a Fund's currency exposure from one foreign currency to another removes that Fund's opportunity to profit from increases in the value of the original currency and involves a risk of increased losses to such Fund if its portfolio manager's projection of future exchange rates is inaccurate. Proxy hedges and cross-hedges may result in losses if the currency used to hedge does not perform similarly to the currency in which hedged securities are denominated. Unforeseen changes in currency prices may result in poorer overall performance for a Fund than if it had not entered into such contracts.

The Funds will cover outstanding forward currency contracts by maintaining liquid portfolio securities denominated in or whose value is tied to, the currency underlying the forward contract or the currency being hedged. To the extent that a Fund is not able to cover its forward currency positions with underlying portfolio securities, the Funds' custodian will segregate cash or other liquid assets having a value equal to the aggregate amount of such Fund's commitments under forward contracts entered into with respect to position hedges, cross-hedges and anticipatory hedges. If the value of the securities used to cover a position or the value of segregated assets declines, a Fund will find alternative cover or segregate additional cash or liquid assets on a daily basis so that the value of the covered and segregated assets will be equal to the amount of such Fund's commitments with respect to such contracts. As an alternative to segregating assets, a Fund may buy call options permitting such Fund to buy the amount of foreign currency being hedged by a forward sale contract or a Fund may buy put options permitting it to sell the amount of foreign currency subject to a forward buy contract.

While forward contracts are not currently regulated by the CFTC, the CFTC may in the future assert authority to regulate forward contacts. In such event, the Funds' ability to utilize forward contracts may be restricted. In addition, a Fund may not always be able to enter into forward contracts at attractive prices and may be limited in its ability to use these contracts to hedge Fund assets.

Options on Foreign Currencies. The Funds may buy and write options on foreign currencies in a manner similar to that in which futures or forward contracts on foreign currencies will be utilized. For example, a decline in the U.S. dollar value of a foreign currency in which portfolio securities are denominated will reduce the U.S. dollar value of such securities, even if their value in the foreign currency remains constant. In order to protect against such diminutions in the value of portfolio securities, a Fund may buy put options on the foreign currency. If the value of the currency declines, such Fund will have the right to sell such currency for a fixed amount in U.S. dollars, thereby offsetting, in whole or in part, the adverse effect on its portfolio.

Conversely, when a rise in the U.S. dollar value of a currency in which securities to be acquired are denominated is projected, thereby increasing the cost of such securities, a Fund may buy call options on the foreign currency. The purchase of such options could offset, at least partially, the effects of the adverse movements in exchange rates. As in the case of other types of options, however, the benefit to a Fund from purchases of foreign currency options will be reduced by the amount of the premium and related transaction costs. In addition, if currency exchange rates do not move in the direction or to the extent projected, a Fund could sustain losses on transactions in foreign currency options that would require such Fund to forego a portion or all of the benefits of advantageous changes in those rates.

The Funds may also write options on foreign currencies. For example, to hedge against a poten-

tial decline in the U.S. dollar value of foreign currency denominated securities due to adverse fluctuations in exchange rates, a Fund could, instead of purchasing a put option, write a call option on the relevant currency. If the expected decline occurs, the option will most likely not be exercised and the decline in value of portfolio securities will be offset by the amount of the premium received.

Similarly, instead of purchasing a call option to hedge against a potential increase in the U.S. dollar cost of securities to be acquired, a Fund could write a put option on the relevant currency which, if rates move in the manner projected, should expire unexercised and allow that Fund to hedge the increased cost up to the amount of the premium. As in the case of other types of options, however, the writing of a foreign currency option will constitute only a partial hedge up to the amount of the premium. If exchange rates do not move in the expected direction, the option may be exercised and a Fund would be required to buy or sell the underlying currency at a loss which may not be offset by the amount of the premium. Through the writing of options on foreign currencies, a Fund also may lose all or a portion of the benefits which might otherwise have been obtained from favorable movements in exchange rates.

The Funds may write covered call options on foreign currencies. A call option written on a foreign currency by a Fund is "covered" if that Fund owns the foreign currency underlying the call or has an absolute and immediate right to acquire that foreign currency without additional cash

consideration (or for additional cash consideration held in a segregated account by its custodian) upon conversion or exchange of other foreign currencies held in its portfolio. A call option is also covered if a Fund has a call on the same foreign currency in the same principal amount as the call written if the exercise price of the call held (i) is equal to or less than the exercise price of the call written or (ii) is greater than the exercise price of the call written, if the difference is maintained by such Fund in cash or other liquid assets in a segregated account with the Funds custodian.

The Funds also may write call options on foreign currencies for cross-hedging purposes. A call option on a foreign currency is for cross-hedging purposes if it is designed to provide a hedge against a decline due to an adverse change in the exchange rate in the U.S. dollar value of a security which a Fund owns or has the right to acquire and which is denominated in the currency underlying the option. Call options on foreign currencies which are entered into for cross-hedging purposes are not covered. However, in such circumstances, a Fund will collateralize the option by segregating cash or other liquid assets in an amount not less than the value of the underlying foreign currency in U.S. dollars marked-to-market daily.

Options on Securities. In an effort to increase current income and to reduce fluctuations in net asset value, the Funds may write covered put and call options and buy put and call options on securities that are traded on United States and foreign securities exchanges and over-the-

counter. The Funds may write and buy options on the same types of securities that the Funds may purchase directly.

A put option written by a Fund is "covered" if that Fund (i) segregates cash not available for investment or other liquid assets with a value equal to the exercise price of the put with the Funds' custodian or (ii) holds a put on the same security and in the same principal amount as the put written and the exercise price of the put held is equal to or greater than the exercise price of the put written. The premium paid by the buyer of an option will reflect, among other things, the relationship of the exercise price to the market price and the volatility of the underlying security, the remaining term of the option, supply and demand and interest rates.

A call option written by a Fund is "covered" if that Fund owns the underlying security covered by the call or has an absolute and immediate right to acquire that security without additional cash consideration (or for additional cash consideration held in a segregated account by the Funds' custodian) upon conversion or exchange of other securities held in its portfolio. A call option is also deemed to be covered if a Fund holds a call on the same security and in the same principal amount as the call written and the exercise price of the call held (i) is equal to or less than the exercise price of the call written or (ii) is greater than the exercise price of the call written if the difference is maintained by that Fund in cash and other liquid assets in segregated account with its custodian.

The Funds also may write call options that are not covered for cross-hedging purposes. A Fund collateralizes its obligation under a written call option for cross-hedging purposes by segregating cash or other liquid assets in an amount not less than the market value of the underlying security, marked-to-market daily. A Fund would write a call option for cross-hedging purposes, instead of writing a covered call option, when the premium to be received from the cross-hedge transaction would exceed that which would be received from writing a covered call option and its portfolio manager believes that writing the option would achieve the desired hedge.

The writer of an option may have no control over when the underlying securities must be sold, in the case of a call option, or bought in the case of a put option, since with regard to certain options, the writer may be assigned an exercise notice at any time prior to the termination of the obligation. Whether or not an option expires unexercised, the writer retains the amount of the premium. This amount, of course, may, in the case of a covered call option, be offset by a decline in the market value of the underlying security during the option period. If a call option is exercised, the writer experiences a profit or loss from the sale of the underlying security. If a put option is exercised, the writer must fulfill the obligation to buy the underlying security at the exercise price, which will usually exceed the then market value of the underlying security.

The writer of an option that wishes to terminate its obligation may effect a "closing purchase transaction." This is accomplished by buying an

option of the same series as the option previously written. The effect of the purchase is that the writer's position will be canceled by the clearing corporation. However, a writer may not effect a closing purchase transaction after being notified of the exercise of an option. Likewise, an investor who is the holder of an option may liquidate its position by effecting a "closing sale transaction." This is accomplished by selling an option of the same series as the option previously bought. There is no guarantee that either a closing purchase or a closing sale transaction can be effected.

In the case of a written call option, effecting a closing transaction will permit a Fund to write another call option on the underlying security with either a different exercise price or expiration date or both. In the case of a written put option, such transaction will permit a Fund to write another put option to the extent that the exercise price is secured by other liquid assets. Effecting a closing transaction also will permit a Fund to use the cash or proceeds from the concurrent sale of any securities subject to the option for other investments. If a Fund desires to sell a particular security from its portfolio on which it has written a call option, such Fund will effect a closing transaction prior to or concurrent with the sale of the security.

A Fund will realize a profit from a closing transaction if the price of the purchase transaction is less than the premium received from writing the option or the price received from a sale transaction is more than the premium paid to buy the option. A Fund will realize a loss from a closing

transaction if the price of the purchase transaction is more than the premium received from writing the option or the price received from a sale transaction is less than the premium paid to buy the option. Because increases in the market of a call option generally will reflect increases in the market price of the underlying security, any loss resulting from the repurchase of a call option is likely to be offset in whole or in part by appreciation of the underlying security owned by a Fund.

An option position may be closed out only where a secondary market for an option of the same series exists. If a secondary market does not exist, the Fund may not be able to effect closing transactions in particular options and the Fund would have to exercise the options in order to realize any profit. If a Fund is unable to effect a closing purchase transaction in a secondary market, it will not be able to sell the underlying security until the option expires or it delivers the underlying security upon exercise. The absence of a liquid secondary market may be due to the following: (i) insufficient trading interest in certain options, (ii) restrictions imposed by a national securities exchange ("Exchange") on which the option is traded on opening or closing transactions or both, (iii) trading halts, suspensions or other restrictions imposed with respect to particular classes or series of options or underlying securities, (iv) unusual or unforeseen circumstances that interrupt normal operations on an Exchange, (v) the facilities of an Exchange or of the Options Clearing Corporation ("OCC") may not at all times be adequate to handle current trading volume, or (vi) one or more Exchanges could,

for economic or other reasons, decide or be compelled at some future date to discontinue the trading of options (or a particular class or series of options), in which event the secondary market on that Exchange (or in that class or series of options) would cease to exist, although outstanding options on that Exchange that had been issued by the OCC as a result of trades on that Exchange would continue to be exercisable in accordance with their terms.

A Fund may write options in connection with buy-and-write transactions. In other words, a Fund may buy a security and then write a call option against that security. The exercise price of such call will depend upon the expected price movement of the underlying security. The exercise price of a call option may be below ("in-the-money"), equal to ("at-the-money") or above ("out-of-the-money") the current value of the underlying security at the time the option is written. Buy-and-write transactions using in-the-money call options may be used when it is expected that the price of the underlying security will remain flat or decline moderately during the option period. Buy-and-write transactions using at-the-money call options may be used when it is expected that the price of the underlying security will remain fixed or advance moderately during the option period. Buy-and-write transactions using out-of-the-money call options may be used when it is, expected that the premiums received from writing the call option plus the appreciation in the market price of the underlying security up to the exercise price will be greater than the appreciation in the price of the underlying security alone. If the call options are exercised in such

transactions, a Fund's maximum gain will be the premium received by it for writing the option, adjusted upwards or downwards by the difference between that Fund's purchase price of the security and the exercise price. If the options are not exercised and the price of the underlying security declines, the amount of such decline will be offset by the amount of premium received.

The writing of covered put options is similar in terms of risk and return characteristics to buy-and-write transactions. If the market price of the underlying security rises or otherwise is above the exercise price, the put option will expire worthless and a Fund's gain will be limited to the premium received. If the market price of the underlying security declines or otherwise is below the exercise price, a Fund may elect to close the position or take delivery of the security at the exercise price and that Fund's return will be the premium received from the put options minus the amount by which the market price of the security is below the exercise price.

A Fund may buy put options to hedge against a decline in the value of its portfolio. By using put options in this way, a Fund will reduce any profit it might otherwise have realized in the underlying security by the amount of the premium paid for the put option and by transaction costs.

A Fund may buy call options to hedge against an increase in the price of securities that it may buy in the future. The premium paid for the call option plus any transaction costs will reduce the benefit, if any, realized by such Fund upon exercise of the option, and, unless the price of the un-

derlying security rises sufficiently, the option may expire worthless to that Fund.

Eurodollar Instruments. A Fund may make investments in Eurodollar instruments. Eurodollar instruments are U.S. dollar-denominated futures contracts or options thereon which are linked to the London Interbank Offered Rate ("LIBOR"), although foreign currency-denominated instruments are available from time to time. Eurodollar futures contracts enable purchasers to obtain a fixed rate for the lending of funds and sellers to obtain a fixed rate for borrowings. A Fund might use Eurodollar futures contracts and options thereon to hedge against changes in LIBOR, to which many interest rate swaps and fixed-income instruments are linked.

Swaps and Swap-Related Products. A Fund may enter into interest rate swaps, caps and floors on either an asset-based or liability-based basis, depending upon whether it is hedging its assets or its liabilities, and will usually enter into interest rate swaps on a net basis (i.e., the two payment streams are netted out, with a Fund receiving or paying, as the case may be, only the net amount of the two payments). The net amount of the excess, if any, of a Fund's obligations over its entitlement with respect to each interest rate swap will be calculated on a daily basis and an amount of cash or other liquid assets having an aggregate net asset value at least equal to the accrued excess will be maintained in a segregated account by the Funds' custodian. If a Fund enters into an interest rate swap on other than a net basis, it would maintain a segregated account in the full amount accrued on a daily ba-

sis of its obligations with respect to the swap. A Fund will not enter into any interest rate swap, cap or floor transaction unless the unsecured senior debt or the claims-paying ability of the other party thereto is rated in one of the three highest rating categories of at least one NRSRO at the time of entering into such transaction. Janus Capital will monitor the creditworthiness of all counterparties on an ongoing basis. If there is a default by the other party to such a transaction, a Fund will have contractual remedies pursuant to the agreements related to the transaction.

The swap market has grown substantially in recent years with a large number of banks and investment banking firms acting both as principals and as agents utilizing standardized swap documentation. Janus Capital has determined that, as a result, the swap market has become relatively liquid. Caps and floors are more recent innovations for which standardized documentation has not yet been developed and, accordingly, they are less liquid than swaps. To the extent a Fund sells (i.e., writes) caps and floors, it will segregate cash or other liquid assets having an aggregate net asset value at least equal to the full amount, accrued on a daily basis, of its obligations with respect to any caps or floors.

There is no limit on the amount of interest rate swap transactions that may be entered into by a Fund. These transactions may in some instances involve the delivery of securities, or other underlying assets by a Fund or its counterparty to collateralize obligations under the swap. Under the documentation currently used in those markets,

the risk of loss with respect to interest rate swaps is limited to the net amount of the payments that a Fund is contractually obligated to make if the other party to an interest rate swap that is not collateralized defaults, a Fund would risk the loss of the net amount of the payments that it contractually is entitled to receive. A Fund may buy and sell (i.e., write) caps and floors without limitation, subject to the segregation requirement described above.

Additional Risks of Options on Foreign Currencies, Forward Contracts and Foreign Instruments. Unlike transactions entered into by the Funds in futures contracts, options on foreign currencies and forward contracts are not traded on contract markets regulated by the CFTC or (with the exception of certain foreign currency options) by the SEC. To the contrary, such instruments are traded through financial institutions acting as market-makers, although foreign currency options are also traded on certain Exchanges, such as the Philadelphia Stock Exchange and the Chicago Board Options Exchange, subject to SEC regulation. Similarly, options on currencies may be traded over-the-counter. In an over-the-counter trading environment, many of the protections afforded to Exchange participants will not be available. For example, there are no daily price fluctuation limits, and adverse market movements could therefore continue to an unlimited extent over a period of time. Although the buyer of an option cannot lose more than the amount of the premium plus related transaction costs, this entire amount could be lost. Moreover, an option writer and a buyer or seller of futures or forward con-

tracts could lose amounts substantially in excess of any premium received or initial margin or collateral posted due to the potential additional margin and collateral requirements associated with such positions.

Options on foreign currencies traded on Exchanges are within the jurisdiction of the SEC, as are other securities traded on Exchanges. As a result, many of the protections provided to traders on organized Exchanges will be available with respect to such transactions. In particular, all foreign currency option positions entered into on an Exchange are cleared and guaranteed by the OCC, thereby reducing the risk of counterparty default. Further, a liquid secondary market in options traded on an Exchange may be more readily available than in the over-the-counter market, potentially permitting a Fund to liquidate open positions at a profit prior to exercise or expiration, or to limit losses in the event of adverse market movements.

The purchase and sale of exchange-traded foreign currency options, however, is subject to the risks of the availability of a liquid secondary market described above, as well as the risks regarding adverse market movements, margining of options written, the nature of the foreign currency market, possible intervention by governmental authorities and the effects of other political and economic events. In addition, exchange-traded options on foreign currencies involve certain risks not presented by the over-the-counter market. For example, exercise and settlement of such options must be made exclusively through the OCC, which has established banking rela-

tionships in applicable foreign countries for this purpose. As a result, the OCC may, if it determines that foreign governmental restrictions or taxes would prevent the orderly settlement of foreign currency option exercises, or would result in undue burdens on the OCC or its clearing member, impose special procedures on exercise and settlement, such as technical changes in the mechanics of delivery of currency, the fixing of dollar settlement prices or prohibitions on exercise.

In addition, options on U.S. government securities, futures contracts, options on futures contracts, forward contracts and options on foreign currencies may be traded on foreign exchanges and over-the-counter in foreign countries. Such transactions are subject to the risk of governmental actions affecting trading in or the prices of foreign currencies or securities. The value of such positions also could be adversely affected by (i) other complex foreign political and economic factors, (ii) lesser availability than in the United States of data on which to make trading decisions, (iii) delays in a Fund's ability to act upon economic events occurring in foreign markets during non-business hours in the United States, (iv) the imposition of different exercise and settlement terms and procedures and margin requirements than in the United States, and (v) low trading volume.

INVESTMENT ADVISER

As stated in the Prospectuses, each Fund has an Investment Advisory Agreement with Janus

Capital, 100 Fillmore Street, Denver, Colorado 80206-4928. Each Advisory Agreement provides that Janus Capital will furnish continuous advice and recommendations concerning the Funds' investments, provide office space for the Funds, and pay the salaries, fees and expenses of all Fund officers and of those Trustees who are affiliated with Janus Capital. Janus Capital also may make payments to selected broker-dealer firms or institutions which perform recordkeeping or other services with respect to shareholder accounts. The minimum aggregate size required for eligibility for such payments, and the factors in selecting the broker-dealer firms and institutions to which they will be made, are determined from time to time by Janus Capital. Janus Capital is also authorized to perform the management and administrative services necessary for the operation of the Funds.

The Funds pay custodian and transfer agent fees and expenses, brokerage commissions and dealer spreads and other expenses in connection with the execution of portfolio transactions, legal and accounting expenses, interest and taxes, trade or other investment company organization dues and expenses, registration fees, expenses of shareholders' meetings and reports to shareholders, fees and expenses of Trustees who are not affiliated with Janus Capital, costs of preparing, printing and mailing the Funds' Prospectuses and SAI to current shareholders and other costs of complying with applicable laws regulating the sale of Fund shares. Pursuant to the Advisory Agreements, Janus Capital furnishes certain other services, including net asset value determination and fund accounting, recordkeeping,

and blue sky registration and monitoring services, for which the Funds may reimburse Janus Capital for its costs.

Each of the Equity Funds have agreed to compensate Janus Capital for its services by the monthly payment of a fee at the annual rate of 0.65% of the average daily net assets of each Fund.

Janus High Yield Fund has agreed to compensate Janus Capital for its services by the monthly payment of a fee at the annual rate of 0.75% of the first $300 million of average daily net assets of the Fund and 0.65% of the average daily net assets in excess of $300 million. Janus Flexible Income Fund and Janus Short-Term Bond Fund have each agreed to compensate Janus Capital for its services by the monthly payment of a fee at the annual rate of 0.65% of the first $300 million of the average daily net assets of the Fund, plus 0.55% of the average daily net assets of the Fund in excess of $300 million. Janus Federal Tax-Exempt Fund has agreed to compensate Janus Capital for its services by the monthly payment of a fee at the annual rate of 0.60% of the first $300 million of average daily net assets of the Fund and 0.55% of the average daily net assets in excess of $300 million. Janus Capital has agreed by contract to waive the advisory fee payable by any of the Fixed-Income Funds in an amount equal to the amount, if any, that such Fund's normal operating expenses chargeable to its income account in any fiscal year, including the investment advisory fee but excluding brokerage commissions, interest, taxes and extraordinary expenses, exceed 1% of the average daily

net assets for a fiscal year for Janus Flexible Income Fund and Janus High-Yield Fund and 0.65% of the average daily net assets for a fiscal year for Janus Short-Term Bond Fund and Janus Federal Tax-Exempt Fund. Janus Capital has agreed to continue such waivers until at least the next annual renewal of the advisory agreement.

The following table summarizes the advisory fees paid by the Funds and any advisory fee waivers for the last three fiscal periods of each Fund. The information below is for fiscal periods ended October 31. The information presented in the table below reflects the management fees in effect during each of the periods shown.

	2001		*2000*[1]		*1999*	
Fund Name	Advisory Fees	Waiver	Advisory Fees	Waiver	Advisory Fees	Waiver
Janus Enterprise Fund	$31,579,339	-	$47,327,307	-	$7,724,455	-
Janus Mercury Fund	$73,061,347	-	$103,376,727	-	$34,579,777	-
Janus Special Situations Fund	$8,604,180	-	$11,046,610	-	$6,903,567	-
Janus Strategic Value Fund	$17,326,328	-	$12,410,248[2]	-	N/A	-
Janus Orion Fund	$4,953,922	-	$2,393,411[3]	-	N/A	-

Janus Fund 2	$2,540,859[4]	-	N/A	-	N/A	-
Janus Global Value Fund	$122,058[5]	-	N/A	-	N/A	-
Janus Core Equity Fund[6]	$5,690,845	-	$6,724,651	-	$4,084,064	-
Janus Growth and Income Fund	$50,426,105	-	$55,928,716	-	$28,839,302	-
Janus Balanced Fund	$30,309,706	-	$26,568,643	-	$13,099,760	-
Janus Flexible Income Fund	$6,609,724	-	$6,558,853	-	$7,263,539	-
Janus Federal Tax-Exempt Fund	$630,395	$394,781	$466,766	$271,741	$614,197	$352,448
Janus High-Yield Fund	$2,783,120	-	$2,140,904	$35,287	$2,217,408	$75,922
Janus Short-Term Bond Fund	$1,814,236	$913,061	$837,123	$475,646	$883,230	$504,515

(1) Effective January 31, 2000, the management fee paid by each Equity Fund was changed to 0.65% of the average daily net assets of such Fund.

(2) February 29, 2000 (inception) to October 31, 2000.

(3) June 30, 2000 (inception) to October 31, 2000.
(4) December 29, 2000 (inception) to October 31, 20001.
(5) June 29, 2001 (inception) to October 31, 2001.
(6) Formerly, Janus Equity Income Fund.

Each Fund's Advisory Agreement is dated April 3, 2002 and will continue in effect until July 1, 2002, and thereafter from year to year so long as such continuance is approved annually by a majority of the Funds' Trustees who are not parties to the Advisory Agreements or interested persons of any such party, and by either a majority of the outstanding voting shares of each Fund or the Trustees of the Funds. Each Advisory Agreement (i) may be terminated without the payment of any penalty by a Fund or Janus Capital on 60 days' written notice; (ii) terminates automatically in the event of its assignment; and (iii) generally, may not be amended without the approval by vote of a majority of the Trustees of the affected Fund, including the Trustees who are not interested persons of that Fund or Janus Capital and, to the extent required by the 1940 Act, the vote of a majority of the outstanding voting securities of that Fund.

Janus Capital is an indirect subsidiary of Stilwell Financial Inc. ("Stilwell"), a publicly traded holding company with principal operations in financial asset management businesses. Stilwell, through its subsidiaries, indirectly owns approximately 92% of Janus Capital, and certain Janus Capital employees directly own approximately 8%.

In approving the Funds' existing Advisory, Agreements, the Trustees considered various matters relating to the possible effects on Janus

Capital and the Funds of the expiration of Mr. Bailey's contractual management rights with respect to Janus Capital, including Stilwell's intentions regarding the preservation and strengthening of Janus Capital's business and existing and proposed incentive compensation arrangements for key Janus Capital employees.

In addition, the Trustees considered a wide range of information of the type they regularly consider when determining whether to continue the Funds' Advisory Agreements as in effect from year to year. The Trustees considered information about, among other things:

- Janus Capital and its personnel (including particularly those personnel with responsibilities for providing services to the Funds), resources and investment process;
- the terms of each Advisory Agreement;
- the scope and quality of the services that Janus Capital has been providing to the Funds;
- the investment performance of each Fund and of comparable funds managed by other advisers over various periods;
- the advisory fee rates payable to Janus Capital by the Funds and by other funds and client accounts managed by Janus Capital, and payable by comparable funds managed by other advisers;
- the total expense ratio of each Fund and of comparable funds managed by other advisers;

- compensation payable by the Funds to affiliates of Janus Capital for other services;
- the profitability to Janus Capital and its affiliates of their relationships with the Funds; and
- Janus Capital's use of the Funds' portfolio brokerage transactions to obtain research benefiting the Funds or other Janus Capital clients at a cost that may be in excess of the amount other brokers would charge or to reduce certain out-of-pocket expenses otherwise payable by the Funds.

Janus Capital acts as sub-adviser for a number of private-label mutual funds and provides separate account advisory services for institutional accounts. Investment decisions for each account managed by Janus Capital, including the Funds, are made independently from those for any other account that is or may in the future become managed by Janus Capital or its affiliates. If, however, a number of accounts managed by Janus Capital are contemporaneously engaged in the purchase or sale of the same security, the orders may be aggregated and/or the transactions may be averaged as to price and allocated to each account in accordance with allocation procedures adopted by Janus Capital. Partial fills for the accounts of two or more portfolio managers will be allocated pro rata under procedures adopted by Janus Capital. In some cases, these allocation procedures may adversely affect the price paid or received by an account or the size of the position obtained or liquidated for an account. In others, however, the accounts' ability to participate in

volume transactions may produce better executions and prices for the accounts.

With respect to allocations of initial public offerings ("IPOs"), under IPO allocation procedures adopted by Janus Capital, accounts will participate in an IPO if the portfolio manager believes the IPO is an appropriate investment based on the account's investment restrictions, risk profile, asset composition, and/or cash levels. These IPO allocation procedures require that each account be assigned to a pre-defined group ("IPO Group"), based on objective criteria set forth in the procedures. Generally, an account may not participate in an IPO unless it is assigned to an IPO Group that correlates with the pre-offering market capitalization ("IPO Classification") of the company. If, however, the portfolio manager intends to build a long-term position in the company and purchases securities in both the initial offering and in the immediate aftermarket, then all participating portfolio managers' clients will receive the same proportion of IPO shares to aftermarket shares, resulting in a blended price equal to the average price paid for all IPO and immediate aftermarket shares. If there is no immediate aftermarket activity, all shares purchased will be allocated pro rata to the participating manager's accounts in the IPO Group corresponding to the IPO Classification, subject to a de minimis standard. In situations where a portfolio manager wants to take a small position in a security, an exception to this de minimis standard may be allowed. These IPO allocation procedures may result in certain accounts, particularly larger accounts, receiving fewer IPOs than other accounts, which may impact performance.

Janus Capital is permitted to adjust its allocation procedures to eliminate fractional shares or odd lots, and has the discretion to deviate front its allocation procedures in certain circumstances. For example, additional securities may be allocated to a portfolio manager who is instrumental in originating or developing an investment opportunity or to comply with a portfolio manager's request to ensure that his or her accounts receive sufficient securities to satisfy specialized investment objectives.

Pursuant to an exemptive order granted by the SEC, the Funds and other funds advised by Janus Capital may also transfer daily uninvested cash balances into one or more joint trading accounts. Assets in the joint trading accounts are invested in money market instruments and the proceeds are allocated to the participating funds on a pro rata basis.

Each account managed by Janus Capital has its own investment objective and policies and is managed accordingly by a particular portfolio manager or team of portfolio managers. As a result, from time to time two or more different managed accounts may pursue divergent investment strategies with respect to investments or categories of Investments.

The Funds' portfolio managers are not permitted to purchase and sell securities for their own accounts except under the limited exceptions contained in the Code of Ethics, which applies to Directors/Trustees of Janus Capital and the Funds and employees of, and persons working on a contractual basis for, Janus Capital and its subsidiaries. The Code of Ethics is on file with and

available from the SEC through the SEC Web site at www.sec.gov. The Code of Ethics requires investment personnel, inside Directors/Trustees of Janus Capital and the Funds and certain other designated employees deemed to have access to current trading information to pre-clear all transactions in securities not otherwise exempt under the Code of Ethics. Requests for trading authorization will be denied when, among other reasons, the proposed personal transaction would be contrary to the provisions of the Code of Ethics or would be deemed to adversely affect any transaction then known to be under consideration for or to have been effected on behalf of any client account, including the Funds.

In addition to the pre-clearance requirement described above, the Code of Ethics subjects such personnel to various trading restrictions and reporting obligations. All reportable transactions are required to be reviewed for compliance with the Code of Ethics. Those persons also may be required under certain circumstances to forfeit their profits made from personal trading.

The provisions of the Code of Ethics are administered by and subject to exceptions authorized by Janus Capital.

CUSTODIAN, TRANSFER AGENT AND CERTAIN AFFILIATIONS

State Street Bank and Trust Company, P.O. Box 0351, Boston, Massachusetts 02117-0351 is the custodian of the domestic securities and cash of the Funds. State Street is the designated Foreign Custody Manager (as the term is defined in Rule

17f-5 under the 1940 Act) of the Funds' securities and cash held outside the United States. The Funds' Trustees have delegated to State Street certain responsibilities for such assets, as permitted by Rule 17f-5. State Street and the foreign subcustodians selected by it hold the Funds' assets in safekeeping and collect and remit the income thereon, subject to the instructions of each Fund.

Janus Services LLC, P.O. Box 173375, Denver, Colorado 80217-3375, a wholly-owned subsidiary of Janus Capital, is the Funds' transfer agent. In addition, Janus Services provides certain other administrative, recordkeeping and shareholder relations services to the Funds. For transfer agency and other services, Janus Services receives a fee calculated at an annual rate of 0.16% of average net assets of each Fund and, in addition, $4 per open shareholder account in each Fund. In addition, the Funds pay DST Systems, Inc. ("DST"), a subsidiary of Stilwell, license fees at the annual rate of $3.06 per shareholder account for the equity funds and $3.98 per shareholder account for the fixed-income funds for the use of DST's shareholder accounting system. The Funds also pay DST $1.10 per closed shareholder account, as well as postage and forms costs that a DST affiliate incurred in mailing Fund shareholder transaction confirmations.

Prior to June 1, 2001, the Funds also paid DST a monthly base fee for the use of its portfolio and fund accounting system, of $265 to $1,323 per month based on the number of Janus funds using the system and an asset charge of $1 per million dollars of net assets (not to exceed $500 per

month). Effective June 1, 2001, State Street Bank and Trust Company acquired the portfolio and fund accounting system of DST.

The Trustees have authorized the Funds to use an affiliate of DST as introducing broker for certain Fund portfolio transactions. Brokerage commissions paid on such, transactions must be used as a means to reduce Fund expenses through credits against the charges of DST and its affiliates. Such credits will not reduce the fees Janus Capital is obligated to pay any Fund under its waiver agreement, and such Fund receives the benefit of any such credits. See "Portfolio Transactions and Brokerage."

Janus Distributors LLC, 100 Fillmore Street, Denver, Colorado 80206-4928, a wholly-owned subsidiary of Janus Capital, is a distributor of the Funds. Janus Distributors is registered as a broker-dealer under the Securities Exchange Act of 1934 and is a member of the National Association of Securities Dealers, Inc. Janus Distributors acts as the agent of the Funds in connection with the sale of their shares in all states in which the shares are registered and in which Janus Distributors is qualified as a broker-dealer. Under the Distribution Agreement, Janus Distributors continuously offers the Funds' shares and accepts orders at net asset value. No sales charges are paid by investors. Promotional expenses in connection with offers and sales of shares are paid by Janus Capital.

PORTFOLIO TRANSACTIONS AND BROKERAGE

Decisions as to the assignment of portfolio business for the Funds and negotiation of its commission rates are made by Janus Capital, whose policy is to seek to obtain the "best execution" of all portfolio transactions (the best net prices under the circumstances based upon a number of factors discussed below) except to the extent that Janus Capital may be permitted to pay higher commissions for research services as described below. The Funds may trade foreign securities in foreign countries because the best available market for these securities is often on foreign exchanges. In transactions on foreign stock exchanges, brokers' commissions are frequently fixed and are often higher than in the United States, where commissions are negotiated.

Janus Capital considers a number of factors in seeking best execution in selecting brokers and dealers and in negotiating commissions. Those factors include, but are not limited to: Janus Capital's knowledge of currently available negotiated commission rates or prices of securities currently available and other current transaction costs; the nature of the security being traded; the size and type of the transaction; the nature and character of the markets for the security to be purchased or sold; the desired timing of the trade; the activity existing and expected in the market for the particular security; confidentiality, including trade anonymity; liquidity; the quality of the execution, clearance and settlement services; financial stability of the broker or dealer; and rebates of commissions by a broker to a Fund or to a third party service provider to the

Fund to pay Fund expenses. In addition, Janus Capital may consider the value of research products or services provided by broker-dealers as a factor in selecting brokers and dealers and in negotiating commissions. In recognition of the value of the foregoing factors, Janus Capital may place portfolio transactions with a broker or dealer with whom it has negotiated a commission that is in excess of the commission another broker or dealer would have charged for effecting that transaction if Janus Capital determines in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research provided by such broker or dealer viewed in terms of either that particular transaction or of the overall responsibilities of Janus Capital. Research may include furnishing advice, either directly or through publications or writings, as to the value of securities, the advisability of purchasing or selling specific securities and the availability of securities or purchasers or sellers of securities; furnishing seminars, information, analyses and reports concerning issuers, industries, securities, trading markets and methods, legislative developments, changes in accounting practices, economic factors and trends and portfolio strategy; access to research analysts, corporate management personnel, industry experts, economists and government officials; comparative performance evaluation and technical measurement services and quotation services, and products and other services (such as third party publications, reports and analyses, and computer and electronic access, equipment, software, information and accessories that deliver, process or otherwise utilize information, includ-

ing the research described above) that assist Janus Capital in carrying out its responsibilities. Research received from brokers or dealers is supplemental to Janus Capital's own research efforts. Most brokers and dealers used by Janus Capital provide research and other services described above. Much of the research provided to Janus Capital by broker-dealers would otherwise be available to Janus Capital for a cash payment. In some cases, research is generated by third parties, but is provided to Janus Capital through broker-dealers. For example, Janus Capital has arrangements with broker-dealers to allocate brokerage in exchange for, among other things, third-party research reports relating to specific industry fundamentals and trends, third-party research reports providing analysis of micro and macro economic trends, and access to databases providing financial, market, economic and fundamental data. Because Janus Capital receives research from broker-dealers, Janus Capital may have an incentive to continue to use those broker-dealers to effect transactions. Janus Capital may also direct trades to a broker-dealer with the instruction that the broker-dealer execute the transaction, but direct a portion of the commission to another broker-dealer that supplies Janus Capital with research services and/or products.

For the fiscal period ended October 31, 2001, the total brokerage commissions paid by the Funds to brokers and dealers in transactions identified for execution primarily on the basis of research and other services provided to the Funds are summarized below:

Fund Name	*Commissions*	*Transactions*
Janus Enterprise Fund	$491,759	$244,822,707
Janus Mercury Fund	$1,295,645	$857,440,917
Janus Special Situations Fund	$128,351	$77,368,297
Janus Strategic Value Fund	$418,043	$289,305,821
Janus Orion Fund	$129,294	$81,326,431
Janus Fund 2[1]	$173,224	$82,642,634
Janus Global Value Fund[2]	$584	$245,654
Janus Core Equity Fund[3]	$114,571	$88,811,163
Janus Growth and Income Fund	$341,974	$182,956,760
Janus Balanced Fund	$303,101	$197,652,773

(1) December 29, 2000 (inception) to October 31, 2000.
(2) June 29, 2001 (inception) to October 31, 2000.
(3) Formerly, Janus Equity Income Fund.
Note: Funds that are not included in the table did not pay commissions related to research for the stated period.

Janus Capital may use research products and services in servicing other accounts in addition to the Funds. Fixed-income related research products and services may be paid for by commissions generated by equity trades. If Janus Capital determines that any research product or service has a mixed use, such that it also serves functions that do not assist in the investment decision-making process, Janus Capital may allocate the costs of such service or product accordingly. Only that portion of the product or service that Janus Capital determines will assist it in the investment decision-making process may be paid

for in brokerage commission dollars. Such allocation may create a conflict of interest for Janus Capital.

Janus Capital does not enter into agreement with any brokers regarding the placement of securities transactions because of the research services they provide. It does, however, have an internal procedure for allocating transactions in a manner consistent with, its execution policy to brokers that it has identified as providing superior execution and research, research-related products or services which benefit its advisory clients, including the Funds. Research products and services incidental to effecting securities transactions furnished by brokers or dealers may be used in servicing any or all of Janus Capital's clients and such research may not necessarily be used by Janus Capital in connection with the accounts which paid commissions to the broker-dealer providing such research products and services.

Janus Capital may consider sales of Fund shares by a broker-dealer or the recommendation of a broker-dealer to its customers that they purchase Fund shares as a factor in the selection of broker-dealers to execute Fund portfolio transactions. Janus Capital may also consider payments made by brokers effecting transactions for a Fund i) to the Fund or ii) to other persons on behalf of the Fund for services provided to the Fund for which it would be obligated to pay. In placing portfolio business with such broker-dealers, Janus Capital will seek the best execution of each transaction.

When the Funds purchase or sell a security in the over-the-counter market, the transaction

takes place directly with a principal market-maker, without the use of a broker, except in those circumstances where in the opinion of Janus Capital better prices and executions will be achieved through the use of a broker.

The Funds' Trustees have authorized Janus Capital to place transactions with DST Securities, Inc. ("DSTS"), a wholly-owned broker-dealer subsidiary of DST. Janus Capital may do so if it reasonably believes that the quality of the transaction and the associated commission are fair and reasonable and if, overall, the associated transaction costs, net of any credits described above under "Custodian, Transfer Agent and Certain Affiliations," are lower than the net costs that would be incurred through other brokerage firms that provide comparable best execution.

The following table lists the total amount of brokerage commissions paid by each Fund for the fiscal periods ending on October 31st of each year:

Fund Name	*2001*	*2000*	*1999*
Janus Enterprise Fund	$803,218	$4,583,253	$1,437,645
Janus Mercury Fund	$1,956,037	$13,866,778	$7,635,143
Janus Special Situations Fund	$177,235	$3,001,448	$2,062,789
Janus Strategic Value Fund	$621,938	$7,156,098[1]	N/A
Janus Orion Fund	$240,695	$998,890[2]	N/A
Janus Fund 2	$225,412[3]	N/A	N/A
Janus Global Value Fund	$5,535[4]	N/A	N/A
Janus Core Equity Fund[5]	$129,018	$1,355,115	$493,786
Janus Growth and Income Fund	$586,980	$5,807,271	$3,425,984
Janus Balanced Fund	$451,600	$3,466,502	$1,046,051
Janus Flexible Income Fund	-	$22,597	$5,000
Janus Federal Tax-Exempt Fund	-	$6,633	$12,353
Janus High-Yield Fund	-	$68	-
Janus Short-Term Bond Fund	-	-	$1,411

(1) February 29, 2000 (inception) to October 31, 2000.
(2) June 30, 2000 (inception) to October 31, 2000.
(3) December 29, 2000 (inception) to October 31, 2001.
(4) June 29, 2001 (inception) to October 31, 2001.
(5) Formerly, Janus Equity Income Fund.

Included in such brokerage commissions are the following amounts paid to DSTS, which served to

reduce each Fund's out-of-pocket expenses as follows:

Fund Name	*Commission Paid through DSTS for the Period Ended October 31, 2001**	*Reduction of Expenses**	*% of Total Commissions+*	*% of Total Transactions*
Janus Enterprise Fund	$66,888	$50,179	8.33%	7.79%
Janus Mercury Fund	$29,688	$22,272	1.52%	2.48%
Janus Special Situations Fund	$18,950	$14,216	10.69%	6.51%
Janus Strategic Value Fund	$56,298	$42,234	9.05%	11.43%
Janus Orion Fund	$13,472	$10,106	5.60%	2.74%
Janus Fund 2[1]	$4,500	$3,376	2.00%	4.95%
Janus Global Value Fund[2]	$933	$700	16.86%	10.46%

Janus Core Equity Fund[3]	$12,637	$9,480	9.80%	8.36%
Janus Growth and Income Fund	$37,480	$28,117	6.39%	11.33%
Janus Balanced Fund	$41,217	$30,920	9.13%	5.71%

* The difference between commissions paid through DSTS and expensed reduced constitute commissions paid to an unaffiliated clearing broker.

† Differences in the percentage of total commissions versus the percentage of total transactions is due, in part, to variations among share prices and number of shares traded, while average price per share commission rates were substantially the same.

(1) December 29, 2000 (inception) to October 31, 2001.

(2) June 29, 2001 (inception) to October 31, 2001.

(3) Formerly, Janus Equity Income Fund.

Note: Funds that did not execute trades with DSTS during the stated period are not included in the table.

Fund Name	*Commission Paid through DSTS for the Period Ended October 31, 2000**	*Reduction of Expenses**	*Commission Paid through DSTS for the Period Ended October 31, 1999**	*Reduction of Expenses**
Janus Enterprise Fund	N/A	N/A	$917	$688
Janus Mercury Fund	$90,323	$67,743	$77,757	$58,318
Janus Special Situations Fund	$5,500	$4,125	$24,048	$18,036
Janus Core Equity Fund[1]	$8,119	$6,089	N/A	N/A
Janus Growth and Income Fund	$77,670	$58,253	$33,857	$25,393
Janus Balanced Fund	$2,448	$1,836	$3,274	$2,456

* The difference between commissions paid through DSTS and expenses reduced constitute commissions paid to an unaffiliated clearing broker.

(1) Formerly, Janus Equity Income Fund.

Note: Funds that did not execute trades with DSTS during the stated period are not included in the table.

As of October 31, 2001, certain Funds owned securities of their regular broker-dealers (or parents), as shown below:

Fund Name	*Name of Broker-Dealer*	*Value of Securities Owned*
Janus Enterprise Fund	Charles Shwab Corp.	$17,989,045
Janus Enterprise Fund	E*TRADE Group, Inc.	16,847,302
Janus Mercury Fund	E*TRADE Group, Inc.	81,743,977
Janus Mercury Fund	Goldman Sachs Group, Inc.	73,845,641
Janus Special Situations Fund	E*TRADE Group, Inc.	16,681,251
Janus Special Situations Fund	Lehman Brothers Holdings Inc.	13,531,022
Janus Strategic Value Fund	Lehman Brothers Holdings, Inc.	77,239,285
Janus Orion Fund	E*TRADE Group, Inc.	19,968,577
Janus Orion Fund	Goldman Sachs Group, Inc.	14,530,335

Fund Name	*Name of Broker-Dealer*	*Value of Securities Owned*
Janus Growth and Income Fund	Charles Schwab Corp.	39,978,232
	Goldman Sachs Group, Inc.	81,481,081
	Merrill Lynch, Pierce, Fenner and Smith, Inc.	71,605,113
Janus Balanced Fund	Charles Shwab Corp.	15,833,000
Janus Balanced Fund	J.P. Morgan Securities, Inc.	58,850,199
Janus Balanced Fund	Merrill Lynch, Pierce, Fenner and Smith, Inc.	16,371,580
Janus Balanced Fund	Salomon Smith Barney Holdings, Inc.	25,193,150
Janus High-Yield Fund	Labranche & Company, Inc.	3,240,000
Janus Short Term Bond Fund	Merrill Lynch, Pierce, Fenner and Smith, Inc.	9,139,063

TRUSTEES AND OFFICERS

The following are the Trustees and officers of the Trust, together with a brief description of their principal occupations during the last five years.

Each Trustee has served in that capacity since he was originally elected or appointed. In addition, each Trustee is currently a Trustee of two other registered investment companies advised by Janus Capital: Janus Aspen Series and Janus Adviser Series. Collectively, these three registered investment companies consist of 51 series or funds.

The Trustees do not serve a specified term of office. Each Trustee will hold office until the termination of the Trust or his earlier death, resignation, retirement, incapacity, or removal. The retirement age for Trustees is 72. The Funds' Nominating and Governance Committee will consider nominees for the position of Trustee recommended by shareholders. Shareholders may submit the name of a candidate for consideration by the Committee by submitting their recommendations to the Trust's Secretary.

Name, Age and Address	Positions Held with Fund	Length of Time Served	Principal Occupations During the Past Five Years	Number of Portfolios in Fund Complex Overseen by Trustee	Other Directorships Held by Trustee
Thomas H. Bailey* 100 Fillmore Street Denver, CO 80206 Age: 64	President, Chairman and Trustee	6/69-Present	President and Chief Executive Officer of Janus Capital; President and Director of the Janus Foundation. Formerly, Chairman and Director (1978-2002) of Janus Capital Corporation; and Director (1997-2001) of Janus Distributors, Inc.	51	N/A
Dennis B. Mullen 100 Fillmore Street Denver, CO 80206 Age: 58	Trustee	2/71-Present	Private Investor. Formerly (1997-1998) Chief Financial Officer - Boston Market Corporation, Boston Chicken, Inc., Golden, CO (a restaurant chain)	51	N/A

* Mr. Bailey is an "interested person" of the Trust by virtue of his positions with Janus Capital.

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Name, Age and Address	Positions Held with Fund	Length of Time Served	Principal Occupations During the Past Five Years	Number of Portfolios in Fund Complex Overseen by Trustee	Other Directorships Held by Trustee
James T. Rothe 100 Fillmore Street Denver, CO 80206 Age: 58	Trustee	1/97-Present	Distinguished Visiting Professor of Business, Thunderbird (American Graduate School of International Management), Phoenix, AZ, and Professor of Business, University of Colorado, Colorado Springs, CO. Formerly (1988-1999) Principal of Phillips-Smith Retail Group, Colorado Springs, CO (a venture capital firm)	51	Director, Optika, Inc.; Director, NeoCore Corp.
William D. Stewart 100 Fillmore Street Denver, CO 80206 Age: 57	Trustee	6/84-Present	Corporate Vice President and General Manager of MKS Instruments – HPS Products, Boulder, CO (a manufacturer of vacuum fittings and valves)	51	N/A
Martin H. Waldinger 100 Fillmore Street Denver, CO 80206 Age: 63	Trustee	8/69-Present	Consultant	51	N/A

OFFICERS			
Name, Age and Address	**Positions Held with Fund**	**Term of Office* and Length of Time Served**	**Principal Occupations During the Past Five Years**
Jonathan D. Coleman** 100 Fillmore Street Denver, CO 80206 Age 30	Executive Vice President and Portfolio Manager Janus Enterprise Fund	2/02-Present	Vice President of Janus Capital. Formerly, Co-Portfolio Manager (1997–2000) for Janus Venture Fund and Analyst (1994-1997) and 2000-2002) for Janus Capital

			Corporation.
David J. Corkins**† 100 Fillmore Street Denver, CO 80206 Age 35	Executive Vice President and Portfolio Manager Janus Growth and Income Fund	8/97-Present	Vice President of Janus Capital. Formerly, Analyst (1995-1997) for Janus Capital Corporation.
David C. Decker** 100 Fillmore Street Denver, CO 80206 Age 35	Executive Vice President and Portfolio Manager Janus Special Situations Fund Janus Strategic Value Fund	9/96-Present	Vice President of Janus Capital. Formerly, Assistant Vice President (1996-1997) of Janus Capital Corporation.
Warren B. Lammert, III**† 100 Fillmore Street Denver, CO 80206 Age 40	Executive Vice President and Portfolio Manager Janus Mercury Fund	2/93-Present	Vice President of Janus Capital.
Sharon S. Pichler** 100 Fillmore Street Denver, CO 80206 Age 52	Executive Vice President and Portfolio Manager Janus Federal Tax-Exempt Fund	1/01-Present	Vice President of Janus Capital.
Karen L. Reidy** 100 Fillmore Street	Executive Vice President and Portfolio	1/00-Present	Vice President of Janus Capital. Formerly, Analyst (1995-1999) of

Denver, CO 80206 Age 34	Manager Janus Balanced Fund Janus Core Equity Fund		Janus Capital Corporation.

* Officers are elected annually by the Trustees for a one-year term.
** "Interested person" of the Trust by virtue of positions with Janus Capital.
† Mr. Lammert and Mr. Corkins are related by marriage.

OFFICERS			
Name, Age and Address	**Positions Held with Fund**	**Term of Office* and Length of Time Served**	**Principal Occupations During the Past Five Years**
Sandy R. Rufenacht, Jr.** 100 Fillmore Street Denver, CO 80206 Age 36	Executive Vice President and Portfolio Manager Janus High-Yield Fund Janus Short-Term Bond Fund	12/95-Present	Vice President of Janus Capital. Formerly, Portfolio Manager (1996-1998) of Janus Flexible Income Fund and Assistant Vice President (1996-1997) of Janus Capital Corporation.
Ron Sachs** 100 Fillmore Street Denver, CO 80206 Age 34	Executive Vice President and Portfolio Manager Janus Orion Fund	4/00-Present	Vice President of Janus Capital. Formerly, Analyst (1996-2000) for Janus Capital Corporation.

John H. Schreiber** 100 Fillmore Street Denver, CO 80206 Age 32	Executive Vice President and Portfolio Manager Janus Fund 2	9/00-Present	Vice President of Janus Capital. Formerly, Analyst (1997-2000) for Janus Capital Corporation and Analyst (1995-1997) for Fidelity Investments
Ronald V. Speaker** 100 Fillmore Street Denver, CO 80206 Age 37	Executive Vice President and Portfolio Manager Janus Flexible Income Fund	7/92-Present	Vice President of Janus Capital. Formerly, Portfolio Manager (1995-1998) of Janus High-Yield Fund.
Jason P. Yee** 100 Fillmore Street Denver, CO 80206 Age 32	Executive Vice President and Portfolio Manager Janus Global Value Fund	3/01-Present	Vice President of Janus Capital. Formerly, Portfolio Manager and Managing Director (1996-2000) for Bee & Associates and Analyst (2000-2001) for Janus Capital Corporation

* Officers are elected annually by the Trustees for a one-year term.

** "Interested person" of the Trust by virtue of positions with Janus Capital.

OFFICERS			
Name, Age and Address	**Positions Held with Fund**	**Term of Office* and Length**	**Principal Occupations During the Past Five Years**

		of Time Served	
Thomas A. Early** 100 Fillmore Street Denver, CO 80205 Age 47	Vice President and General Counsel	3/98-Present	Vice President, General Counsel, Secretary and Interim Director of Janus Capital; Vice President, General Counsel, Secretary and Director of Janus Services LLC, Janus Capital International LLC and Janus Institutional Services LLC; Vice President, General Counsel and Director to Janus International (Asia) Limited and Janus International Limited; Vice President, General Counsel and Secretary to Janus Distributors LLC and the Janus Foundation; and Director for Janus Capital Trust Manager Limited and Janus World Funds. Formerly, Director (2001) of Janus Distributors, Inc.; Vice President, General Counsel, Sec-

			retary and Director (2000-2002) of Janus International Holding, Inc.; and Executive Vice President and General Counsel/Mutual Funds (1994-1998) of Prudential Insurance Company.
Bonnie M. Howe ** 100 Fillmore Street Denver, CO 80206 Age 36	Vice President	12/99-Present	Vice President and Assistant General Counsel to Janus Capital, Janus Distributors LLC and Janus Services LLC. Formerly, Assistant Vice President (1997-1999) and Associate Counsel (1995-1999) for Janus Capital Corporation and Assistant Vice President (1998-2000) for Janus Service Corporation.
Kelley Abbott Howes ** 100 Fillmore Street Denver, CO 80206 Age 36	Vice President and Secretary	12/99-Present	Vice President and Assistant General Counsel of Janus Capital, Janus Distributors LLC and Janus Services LLC. Formerly, Assistant Vice President (1997-1999) of Janus Capital Corpora-

			tion; Chief Compliance Officer, Director and President (1997-1999) of Janus Distributors Inc.; and Assistant Vice President (1998-2000) of Janus Service Corporation.

* Officers are elected annually by the Trustees for a one-year term.
** "Interested person" of the Trust by virtue of positions with Janus Capital.

OFFICERS			
Name, Age and Address	**Positions Held with Fund**	**Term of Office* and Length of Time Served**	**Principal Occupations During the Past Five Years**
Glenn P. O'Flaherty** 100 Fillmore Street Denver, CO 80206 Age 43	Treasurer and Chief Accounting Officer	1/96-Present	Vice President of Janus Capital. Formerly, Director of Fund Accounting (1991-1997) of Janus Capital Corporation.
Loren M. Starr** 100 Fillmore Street Denver, CO 80206 Age 40	Vice President and Chief Financial Officer	9/01-Present	Vice President of Finance, Treasurer, Chief Financial Officer and Interim Director of Janus Capital; Vice President of Finance, Treas-

			urer and Chief Financial Officer of Janus Services LLC and Janus International Limited; Vice President of Finance, Treasurer, Chief Financial Officer and Director of Janus Distributors LLC, Janus Capital International LLC and Janus Institutional Services LLC; and Director of Janus Capital Trust Manager Limited and Janus World Funds. Formerly, Vice President of Finance, Treasurer, Chief Financial Officer (2001-2002) and Director (2002) of Janus International Holding, Inc.; Managing Director, Treasurer and Head of Corporate Finance and Reporting (1998-2001) for Putnam Investments; and Senior Vice President of Financial Planning and Analysis (1996-1998) for Lehman

			Brothers, Inc.
Heidi J. Walter** 100 Fillmore Street Denver, CO 80206 Age 34	Vice President	4/00-Present	Vice President and Assistant General Counsel to Janus Capital and Janus Services LLC. Formerly, Vice President and Senior Legal Counsel (1995-1999) for Stein Roe & Farnham, Inc.

* Officers are elected annually by the Trustees for a one-year term.

** "Interested person" of the Trust by virtue of positions with Janus Capital.

The Trustees are responsible for major decisions relating to each Fund's objective(s), policies and techniques. The Trustees also supervise the operation of the Funds by their officers and review the investment decisions of the officers, although they do not actively participate on a regular basis in making such decisions. The Board of Trustees has five standing committees that each perform specialized functions: an Audit Committee, Brokerage Committee, Money Market Committee, Nominating and Governance Committee and Pricing Committee. Information about each of these committees is provided in the following table:

	Functions	**Members**	**Number of Meetings Held During Last Fiscal Year**
Audit Committee	Reviews the financial report-	Martin H. Waldinger	4

	ing process, the system of internal control, the audit process, and the Trusts' process for monitoring compliance with investment restrictions and applicable laws and the Trusts' Code of Ethics.	(Chairman) William D. Stewart Dennis B. Mullen	
Brokerage Committee	Reviews and makes recommendations regarding matters related to the Trusts' use of brokerage commissions and placement of portfolio transactions.	James T. Rothe (Chairman) William D. Stewart Dennis B. Mullen	5
Money Market Committee	Reviews various matters related to the operations of the Janus Money Market Funds, including compliance with each Trust's Money Market Fund Procedures.	William D. Stewart (Chairman) Dennis B. Mullen James T. Rothe	4
Nominating and Governance Committee	Identifies and recommends individuals for Trustee membership, con-	Dennis B. Mullen (Chairman) William D.	3

	sults with Management in planning Trustee meetings, and oversees the administration of, and ensures the compliance with, the Governance Procedures and Guidelines adopted by the Trusts.	Stewart Martin H. Waldinger	
Pricing Committee	Determines the fair value of restricted securities and other securities for which market quotations are not readily available, pursuant to procedures adopted by the Trustees.	William D. Stewart (Chairman) Dennis B. Mullen James T. Rothe	15

The table below gives the dollar range of Shares of each Fund described in this SAI, as well as the aggregate dollar range of shares of all funds advised and sponsored by Janus Capital (collectively, the "Janus Funds"), owned by each trustee as of December 31, 2001.

Name of Trustee	Dollar Range of Equity Securities in the Funds		Aggregate Dollar Range of Equity Securities in All Registered Investment Companies Overseen by Trustee in Janus Funds
Interested Trustee			
Thomas H. Bailey	Janus Enterprise Fund	$10,001-$50,000	Over $100,000
	Janus Mercury Fund	Over $100,000	
	Janus Special Situations Fund	Over $100,000	
	Janus Strategic Value Fund	Over $100,000	
	Janus Orion Fund	Over $100,000	
	Janus Fund 2	Over $100,000	
	Janus Global Value Fund	Over $100,000	
	Janus Core Equity Fund	Over $100,000	
	Janus Growth and Income Fund	Over $100,000	
	Janus Balanced Fund	$10,001-$50,000	

Name of Trustee	Dollar Range of Equity Securities in the Funds		Aggregate Dollar Range of Equity Securities in All Registered Investment Companies Overseen by Trustee in Janus Funds
Independent Trustees			
Dennis B. Mullen	Janus Enterprise Fund	$50,001-$100,000	Over $100,000
	Janus Mercury Fund	Over $100,000	
	Janus Special Situations Fund	$50,001-$100,000	
	Janus Strategic Value Fund	$50,001-$100,000	
	Janus Orion Fund	$50,001-$100,000	
	Janus Fund 2	$50,001-$100,000	
	Janus Global Value Fund	Over $100,000	
	Janus Growth and Income Fund	Over $100,000	
James T. Rothe	Janus Enterprise Fund	$10,001-$50,000	Over $100,000
	Janus Fund 2	$10,001-$50,000	
William D. Stewart	Janus Enterprise Fund	$1-$10,000	Over $100,000
	Janus Flexible Income Fund	$1-$10,000	
	Janus Mercury Fund	$50,001-$100,000	
	Janus Special Situations Fund	$1-$10,000	

	Janus Orion Fund	$1-$10,000	
Martin H. Waldinger	Janus Strategic Value Fund	$10,001-$50,000	Over $100,000
	Janus Orion Fund	$50,001-$100,000	

As of December 31, 2001, none of the Trustees or their immediate family members owned shares of Janus Capital, Janus Distributors LLC, or their control persons.

The following table shows the aggregate compensation earned by and paid to each Trustee by the Funds described in this SAI and all Janus Funds for the periods indicated. None of the Trustees receives any pension or retirement benefits from the Funds or the Janus Funds.

Name of Person, Position	Aggregate Compensation From the Funds for Fiscal year ended October 31, 2001	Total Compensation From the Janus Funds for calendar year ended December 31, 2001***
Thomas H. Bailey, Chairman and Trustee*	$0	$0
William D. Stewart, Trustee**	$32,035	$185,000
Dennis B. Mullen, Trustee**	$29,872	$185,000
Martin H. Waldinger	$32,328	$185,000
James T. Rothe, Trustee**	$29,677	$185,000

* Mr. Bailey is an interested person of the Funds and Janus Capital and is compensated by Janus Capital.

** Independent Trustee.

*** As of December 31, 2001, Janus Funds consisted of three

registered investment companies comprised of a total of 51 funds.

PURCHASE OF SHARES

Shares of the Funds are sold at the net asset value per share as determined at the close of the regular trading session of the New York Stock Exchange (the "NYSE") next occurring after a purchase order is received and accepted by a Fund. The Shareholder's Manual section of the Funds' Prospectuses contains detailed information about the purchase of shares.

NET ASSET VALUE DETERMINATION

As stated in the Funds' Prospectuses, the net asset value ("NAV") of Fund shares is determined once each day the NYSE is open, at the close of its regular trading session (normally 4:00 p.m., New York time, Monday through Friday). The NAV of Fund shares is not determined on days the NYSE is closed. The per share NAV of each Fund is determined by dividing the total value of a Fund's securities and other assets, less liabilities, by the total number of shares outstanding. In determining NAV, securities listed on an Exchange, the Nasdaq National Market and foreign markets are generally valued at the closing prices on such markets, or if such price is lacking for the trading period immediately preceding the time of determination, such securities are valued at their current bid price. Municipal securities held by the Funds are traded primarily in the over-the-counter market. Valuations of such securities are furnished by one or more pricing services employed by the Funds and approved by

the Trustees and are based upon a computerized matrix system or appraisals obtained by a pricing service, in each case in reliance upon information concerning market transactions and quotations from recognized municipal securities dealers. Other securities that are traded on the over-the-counter market are generally valued at their closing bid prices. Foreign securities and currencies are converted to U.S. dollars using the exchange rate in effect at the close of the NYSE. Each Fund will determine the market value of individual securities held by it, by using prices provided by one or more professional pricing services which may provide market prices to other funds, or, as needed, by obtaining market quotations from independent broker-dealers. Short-term securities maturing within 60 days are valued on an amortized cost basis. Securities for which market quotations are not readily available are valued at fair value determined in good faith under procedures established by and under the supervision of the Trustees (the "Valuation Procedures").

Trading in securities on European and Far Eastern securities exchanges and over-the-counter markets is normally completed well before the close of business on each business day in New York (i.e., a day on which the NYSE is open). In addition, European or Far Eastern securities trading generally or in a particular country or countries may not take place on all business days in New York. Furthermore, trading takes place in Japanese markets on certain Saturdays and in various foreign markets on days which are not business days in New York and on which a Fund's NAV is not calculated. A Fund calculates

its NAV per share, and therefore effects sales, redemptions and repurchases of its shares, as of the close of the NYSE once on each day on which the NYSE is open. Such calculation may not take place contemporaneously with the determination of the prices of the foreign portfolio securities used in such calculation. If an event that is expected to affect the value of a portfolio security occurs after the close of the exchange or market on which that security is traded, and before the Fund calculates its NAV per share, then that security may be valued in good faith under the Valuation Procedures.

REINVESTMENT OF DIVIDENDS AND DISTRIBUTIONS

If investors do not elect online at janus.com, in writing or by phone to receive their dividends and distributions in cash, all income dividends and capital gains distributions, if any, on a Fund's shares are reinvested automatically in additional shares of that Fund at the NAV determined on the payment date. Checks for cash dividends and distributions and confirmations of reinvestments are usually mailed to shareholders within ten days after the record date. Any election of the manner in which a shareholder wishes to receive dividends and distributions (which may be made online at janus.com or by phone) will apply to dividends and distributions the record dates of which fall on or after the date that a Fund receives such notice. Changes to distribution options must be received at least three days prior to the record date to be effective for such date. Investors receiving cash distributions and dividends may elect online at

janus.com, in writing or by phone to change back to automatic reinvestment at any time.

REDEMPTION OF SHARES

Procedures for selling shares are set forth in the Shareholder's Manual section of the Funds' Prospectuses. Shares normally will be sold for cash, although each Fund retains the right to sell some or all, of its shares in kind under unusual circumstances, in order to protect the interests of remaining shareholders, or to accommodate a request by a particular shareholder that does not adversely affect the interest of the remaining shareholders, by delivery of securities selected from its assets at its discretion. However, the Funds are governed by Rule 18f-1 under the 1940 Act, which requires each Fund to sell shares solely in cash up to the, lesser of $250,000 or 1% of the NAV of that Fund during any 90-day period for any one shareholder. Should redemptions by any shareholder exceed such limitation, a Fund will have the option of selling the excess in cash or in kind. If shares are sold in kind, the redeeming shareholder might incur brokerage costs in converting the assets to cash. The method of valuing securities used to make redemptions in kind will be the same as the method of valuing portfolio securities described under "Purchase of Shares — Net Asset Value Determination" and such valuation will be made as of the same time the redemption price is determined.

The right to require the Funds to sell their shares may be suspended, or the date of payment may be postponed, whenever (1) trading on the

NYSE is restricted, as determined by the SEC, or the NYSE is closed except for holidays and weekends, (2) the SEC permits such suspension and so orders, or (3) an emergency exists as determined by the SEC so that disposal of securities or determination of NAV is not reasonably practicable.

SHAREHOLDER ACCOUNTS

Detailed information about the general procedures for shareholder accounts and specific types of accounts is set forth in the Funds' Prospectuses and at janus.com. Applications for specific types of accounts may be obtained by visiting janus.com, calling a Janus Representative or writing to the Funds at P.O. Box 173375, Denver, Colorado 80217-3375.

ONLINE AND TELEPHONE TRANSACTIONS

As stated in the Prospectuses, shareholders may initiate a number of transactions at janus.com and by telephone. The Funds, their transfer agent and their distributor disclaim responsibility for the authenticity of instructions received at janus.com and by telephone. Such entities will employ reasonable procedures to confirm that instructions communicated online at janus.com and by telephone are genuine. Such procedures may include, among others, requiring personal identification prior to acting upon online and telephone instructions, providing written confirmation of online and telephone transactions and tape recording telephone conversations.

SYSTEMATIC REDEMPTIONS

As stated in the Shareholder's Manual section of the Prospectuses, if you have a regular account or are eligible for distributions from a retirement plan, you may establish a systematic redemption option. The payments will be made from the proceeds of periodic redemptions of shares in the account at the NAV. Depending on the size or frequency of the disbursements requested, and the fluctuation in value of a Fund's portfolio, redemptions for the purpose of making such disbursements may reduce or even exhaust the shareholder's account. Either an investor or a Fund, by written notice to the other, may terminate the investor's systematic redemption option without penalty at any time.

Information about requirements to establish a systematic redemption option may be obtained by visiting janus.com, calling a Janus Representative or writing the Funds.

TAX-DEFERRED ACCOUNTS

The Funds offer several different types of tax-deferred accounts that an investor may establish to invest in Fund shares, depending on rules prescribed by the Code. Traditional and Roth Individual Retirement Accounts may be used by most individuals who have taxable compensation. Simplified Employee Pensions and Defined Contribution Plans (Profit Sharing or Money Purchase Pension Plans) may be used by most employers, including corporations, partnerships and small business owners (including sole proprietors), for the benefit of business owners and their employees. In addition, the Funds offer a Section 403(b)(7) Plan for employees of educational or-

ganizations and other qualifying tax-exempt organizations. Investors should consult their tax adviser or legal counsel before selecting a tax-deferred account.

Contributions under Traditional and Roth IRAs, SEPs, Defined Contribution Plans and Section 403(b)(7) Plans are subject to specific contribution limitations. Generally, such contributions may be invested at the direction of the participant.

Distributions from tax-deferred retirement accounts may be subject to ordinary income tax and may be subject to an additional 10% tax if withdrawn prior to age 59 1/2 or used, for a nonqualifying purpose. Additionally, shareholders generally must start withdrawing retirement plan assets no later than April 1 of the year after they reach age 70 1/2. Several exceptions to these general rules may apply and several methods exist to determine the amount and timing of the minimum annual distribution (if any). Shareholders should consult with their tax adviser or legal counsel prior to receiving any distribution from any tax-deferred account, in order to determine the income tax impact of any such distribution.

Coverdell Education Savings Accounts (formerly Education IRAs) allow individuals, subject to certain income limitations, to contribute up to $2,000 annually on behalf of any child under the age of 18. Contributions are also allowed on behalf of children with special needs beyond age 18. Distributions are generally subject to income tax if not used for qualified education expenses.

To receive additional information about Traditional and Roth IRAs, SEPs, Defined Contribution Plans, Section 403(b)(7) Plans and Coverdell Education Savings Accounts along with the necessary materials to establish an account, please visit janus.com, call a Janus Representative or write to the Funds at P.O. Box 173375, Denver, Colorado 80217-3375. No contribution to a Traditional or Roth IRA, SEP, Defined Contribution Plan, Section 403(b)(7) Plan or Coverdell Education Savings Account can be made until the appropriate forms to establish any such plan have been completed.

INCOME DIVIDENDS, CAPITAL GAINS, DISTRIBUTIONS AND TAX STATUS

It is a policy of the Funds to make distributions of substantially all of their investment income and any net realized capital gains. Any capital gains realized during each fiscal year ended October 31, as defined by the Code, are normally declared and payable to shareholders in December. Janus Enterprise Fund, Janus Mercury Fund, Janus Special Situations Fund, Janus Strategic Value Fund, Janus Orion Fund, Janus Fund 2, Janus Global Value Fund and Janus Core Equity Fund declare and make annual distributions of income (if any); Janus Balanced Fund and Janus Growth and Income Fund declare and make quarterly distributions of income and Janus Flexible Income Fund, Janus High-Yield Fund, Janus Federal Tax-Exempt Fund and Janus Short-Term Bond Fund declare dividends daily and make monthly distributions of income. If a month begins on a Saturday, Sun-

day or holiday, dividends for daily dividend Funds for those days are declared at the end of the preceding month. Janus Federal Tax-Exempt Fund will use the "average annual method" to determine the designated percentage of each distribution that is tax-exempt. Under this method, the percentage of income designated as tax-exempt is based on the percentage of tax-exempt income earned for each annual period, and may be substantially different from the Fund's income that was tax-exempt during any monthly period. The Funds intend to qualify as regulated investment companies by satisfying certain requirements prescribed by Subchapter M of the Code. Accordingly, a Fund will invest no more than 25% of its total assets in a single issuer (other than U.S. government securities).

The Funds may purchase securities of certain foreign corporations considered to be passive foreign investment companies by the IRS. In order to avoid taxes and interest that must be paid by the Funds, the Funds may make various elections permitted by the tax laws. However, these elections could require that the Funds recognize taxable income, which in turn must be distributed.

Some foreign securities purchased by the Funds may be subject to foreign taxes which could reduce the yield on such securities. If the amount of foreign taxes is significant in a particular year, the Funds that qualify under Section 853 of the Code may elect to pass through such taxes to shareholders, who will each decide whether to deduct such taxes or claim a foreign tax credit. If such election is not made, foreign taxes paid or

accrued will represent an expense to each Fund which will reduce its investment company taxable income.

PRINCIPAL SHAREHOLDERS

As of January 31, 2002, the officers and Trustees of the Funds as a group owned less than 1% of the outstanding shares of each of the Funds.

As of January 28, 2002, Charles Schwab & Co., Inc. ("Schwab"), 101 Montgomery Street, San Francisco, CA 94140-4122, and National Financial Services Co. ("National Financial"), P.O. Box 3908, Church Street Station, New York, NY 10008-3908; owned of record 5% or more of the outstanding shares of the Funds for the exclusive benefit of their customers, as shown below:

Fund Name	*Held by Schwab*
Janus Enterprise Fund	14.11%
Janus Mercury Fund	17.55%
Janus Special Situations Fund	15.29%
Janus Strategic Value Fund	17.78%
Janus Orion Fund	10.77%
Janus Fund 2	22.75%
Janus Global Value Fund	26.16%
Janus Core Equity Fund[1]	18.53%
Janus Growth and Income Fund	21.51%
Janus Balanced Fund	18.82%
Janus Flexible Income Fund	26.79%
Janus Federal Tax-Exempt Fund	8.02%
Janus High-Yield Fund	29.15%
Janus Short-Term Bond Fund	6.82%

(1) Formerly, Janus Equity Income Fund.

Fund Name	*Held by National Financial*
Janus Enterprise Fund	7.07
Janus Mercury Fund	8.27
Janus Special Situations Fund	8.42
Janus Strategic Value Fund	6.64
Janus Orion Fund	8.62
Janus Fund 2	5.04
Janus Core Equity Fund[1]	10.84
Janus Growth and Income Fund	10.62
Janus Balanced Fund	7.53
Janus Flexible Income Fund	8.50
Janus High-Yield Fund	15.08
Janus Short-Term Bond Fund	5.26

(1) Formerly, Janus Equity Income Fund.

According to information provided by Schwab and National Financial, this ownership is by nominee only and does not represent beneficial ownership of such shares, because they have no investment discretion or voting power with respect to such shares.

In addition, as of January 28, 2002, more than 5% of the outstanding shares of the following Funds were owned of record by the shareholders listed below:

Fund	*Shareholder and Address of Record*	*Percentage Ownership*
Janus Enterprise Fund	FIIC as Agent for Certain Employee Benefit Plans 100 Magellan Way, KWIC Covington, KY 41015-1987	7.88%

	The Manufacturers Life Insurance Company (USA) 250 Bloor Street East, 7th Floor Toronto, ON M4W Canada M4W 1E5	7.28%
Janus Balanced Fund	FIIC as Agent for Certain Employee Benefit Plans 100 Magellan Way, KWIC Covington, KY 41015-1987	8.22%

To the knowledge of the Funds, no other shareholder owned 5% or more of the outstanding shares of any Fund as of January 28, 2002.

MISCELLANEOUS INFORMATION

Each Fund is a series of the Trust, a Massachusetts business trust that was created on February 11, 1986. The Trust is an open-end management investment company registered under the 1940 Act. As of the date of this SAI, the Trust offers 25 separate series, three of which currently offer three classes of shares.

Janus Capital reserves the right to the name "Janus." In the event that Janus Capital does not continue to provide investment advice to the Funds, the Funds must cease to use the name "Janus" as soon as reasonably practicable.

Under Massachusetts law, shareholders of the Funds could, under certain circumstances, be held liable for the obligations of their Fund. However, the Declaration of Trust disclaims

shareholder liability for acts or obligations of the Funds and requires that notice of this disclaimer be given in each agreement, obligation or instrument entered into or executed by the Funds or the Trustees. The Declaration of Trust also provides for Indemnification from the assets of the Funds for all losses and expenses of any Fund shareholder held liable for the obligations of their Fund. Thus, the risk of a shareholder incurring a financial loss on account of its liability as a shareholder of one of the Funds is limited to circumstances in which their Fund would be unable to meet its obligations. The possibility that these circumstances would occur is remote. The Trustees intend to conduct the operations of the Funds to avoid, to the extent possible, liability of shareholders for liabilities of their Fund.

SHARES OF THE TRUST

The Trust is authorized to issue an unlimited number of shares of beneficial interest with a par value of one cent per share for each series of the Trust. Shares of each Fund are fully paid and nonassessable when issued. All shares of a Fund participate equally in dividends and other distributions by such Fund, and in residual assets of that Fund in the event of liquidation. Shares of each Fund have no preemptive, conversion or subscription rights. Shares of each Fund may be transferred by endorsement or stock power as is customary, but a Fund is not bound to recognize any transfer until it is recorded on its books.

SHAREHOLDER MEETINGS

The Trust does not intend to hold annual or regular shareholder meetings unless otherwise required by the Declaration of Trust or the 1940

Act. Special meetings may be called for a specific Fund or for the Trust as a whole for purposes such as changing fundamental policies; electing or removing Trustees; making any changes to the Declaration of Trust that would materially adversely affect shareholders' rights; determining whether to bring certain derivative actions; or for any other purpose that requires a shareholder vote under applicable law or the Trust's governing documents, or as the Trustees consider necessary or desirable. The present Trustees were elected at a meeting of shareholders held on January 31, 2002. Under the Declaration of Trust, each Trustee will continue in office until the termination of the Trust or his earlier death, retirement, resignation, incapacity, or removal. Vacancies will be filled by a majority of the remaining Trustees, subject to the 1940 Act.

VOTING RIGHTS

As a shareholder, you are entitled to one vote for each dollar of net asset value of the Fund that you own. Generally all Funds vote together as a single group, except where a separate vote of one or more Funds is required by law or where the interests of one or more Funds are affected differently from other Funds. Shares of all series of the Trust have noncumulative voting rights, which means that the holders of more than 50% of the value of shares of all series of the Trust voting for election of Trustees can elect 100% of the Trustees if they choose to do so. In such event, the holders of the remaining value of shares will not be able to elect any Trustees.

MASTER/FEEDER OPTION

The Trust may in the future seek to achieve a Fund's objective by investing all of that Fund's assets in another investment company having the same investment objective and substantially the same investment policies and restrictions as those applicable to that Fund. Unless otherwise required by law, this policy may be implemented by the Trustees without shareholder approval.

INDEPENDENT ACCOUNTANTS

PricewaterhouseCoopers LLP, 1670 Broadway, Suite 100Q, Denver, Colorado 80202, independent accountants for the Funds, audit the Funds' annual financial statements and prepare their tax returns.

REGISTRATION STATEMENT

The Trust has filed with the SEC, Washington, D.C., a Registration Statement under the Securities Act of 1933, as amended, with respect to the securities to which this SAI relates. If further information is desired with respect to the Funds or such securities, reference is made to the Registration Statement and the exhibits filed as a part thereof.

PERFORMANCE INFORMATION

Quotations of average annual total return for a Fund will be expressed in terms of the average annual compounded rate of return of a hypothetical investment in such Fund over periods of 1, 5, and 10 years (up to the life of the Fund) that would equate the initial amount invested to the ending value. These rates of return are quoted

using three different measures: (1) average annual total return before taxes; (2) average annual total return after taxes on distributions; and (3) average annual total return after taxes on distribution and redemption. The average annual total return before taxes is calculated based on the following formula: $P(1+T)^n = ERV$ (where P = a hypothetical initial payment of $1,000, T = the average annual total return, n = the number of years and ERV = the ending redeemable value of a hypothetical $1,000 payment made at the beginning of the period). The average annual total return after taxes on distribution is calculated based on the following formula: $P(1+T)^n\ ATV_D$ (where P = a hypothetical initial payment of $1,000, T = average annual total return (after taxes on distributions), n = the number of years and ATV_D - the ending value of a hypothetical $1,000 payment made at the beginning of the period). Average annual total return after taxes on distributions and redemption is calculated based on the following formula: $P(1+T)^n = ATV_{DR}$ (where P = a hypothetical initial payment of $1,000, T = the average annual total return (after taxes on distributions and redemptions), n = the number of years and ATV_{DR} = the ending value of a hypothetical $1,000 payment made at the beginning of the period).

All total return figures reflect the deduction of a proportional share of Fund expenses on an annual basis, and assume that all dividends and distributions, less taxes due on such distributions, are reinvested when paid. The taxes due are calculated using the highest individual marginal federal tax rates and capital gains tax rates in effect on the reinvestment date. State and lo-

cal taxes are not considered. In addition, the formulas do not take into account the effect of the alternative minimum tax or phaseouts of certain tax credits, exemptions and deductions for taxpayers whose adjusted gross income is above a specified amount.

The average annual total return before taxes of each Fund, computed as of October 31, 2001, is shown in the table below:

Fund Name	*Date Available for Sale*	*Number of Months in Lifetime*	*Average Annual Total Return (Before Taxes)*			
			One Year	*Five Years*	*Ten Years*	*Life of Fund*
Janus Enterprise Fund	9/1/92	110	(56.63)%	4.57%	N/A	12.55%
Janus Mercury Fund	5/3/93	102	(46.21)%	12.44%	N/A	16.89%
Janus Special Situations Fund	12/31/96	58	(34.49)%	N/A	N/A	11.78%
Janus Strategic Value Fund	2/29/00	20	(23.61)%	N/A	N/A	(8.47)%
Janus Orion Fund	6/30/00	16	(40.69)%	N/A	N/A	(38.46)%
Janus Fund 2	12/29/00	10	N/A	N/A	N/A	(31.70)%[1]
Janus Global Value Fund	6/29/01	4	N/A	N/A	N/A	(3.10)%[2]
Janus Core Equity Fund[3]	6/28/96	64	(21.70)%	14.50%	N/A	16.18%
Janus Growth and Income Fund	5/15/91	125.5	(27.66)%	15.17%	14.94%	16.38%
Janus Balanced Fund	9/1/92	110	(8.83)%	12.94%	N/A	13.79%
Janus Flexible Income Fund	7/7/87	172	12.41%	7.33%	8.88%	8.52%

Janus Federal Tax-Exempt Fund	5/3/93	102	8.80%	5.21%	N/A	5.11%
Janus High-Yield Fund	12/29/95	70	2.23%	5.98%	N/A	8.37%
Janus Short-Term Bond Fund	9/1/92	110	9.50%	6.61%	N/A	5.69%

(1) Cumulative total return from December 29, 2000 (inception) to October 31, 2001.

(2) Cumulative total return from June 29, 2001 (inception) to October 31, 2001.

(3) Formerly, Janus Equity Income Fund.

Average annual total return after taxes on distributions assumes that (1) taxes are paid on distributions at the time of the distribution; (2) shares were held for the entire measurement period; and (3) no taxes have been paid on accumulated capital appreciation. The average annual total return after taxes on distributions of each Fund, computed as of October 31, 2001, is shown in the table below:

Fund Name	*Date Available for Sale*	*Number of Months in Lifetime*	*Average Annual Total Return (After Taxes on Distributions)* *One Year*	*Five Years*	*Ten Years*	*Life of Fund*
Janus Enterprise Fund	9/1/92	110	(56.63)%	3.25%	N/A	11.19%
Janus Mercury Fund	5/3/93	102	(48.03)%	8.87%	N/A	14.00%
Janus Special Situations Fund	12/31/96	58	(35.53)%	N/A	N/A	10.01%
Janus Strategic Value Fund	2/29/00	20	(24.33)%	N/A	N/A	(8.99)%
Janus Orion Fund	6/30/00	16	(40.76)%	N/A	N/A	(38.51)%
Janus Fund 2	12/29/00	10	N/A	N/A	N/A	(31.70)%[1]
Janus Global Value Fund	6/29/01	4	N/A	N/A	N/A	(3.10)%[2]
Janus Core Equity Fund[3]	6/28/96	64	(24.06)%	12.56%	N/A	14.31%
Janus Growth and Income Fund	5/15/91	125.5	(28.59)%	12.90%	13.12%	14.61%
Janus Balanced Fund	9/1/92	110	(10.98)%	10.20%	N/A	11.53%
Janus Flexible Income Fund	7/7/87	172	9.68%	4.28%	5.66%	5.33%

Janus Federal Tax-Exempt Fund	5/3/93	102	8.77%	5.17%	N/A	5.07%
Janus High-Yield Fund	12/29/95	70	(0.93)%	2.13%	N/A	4.48%
Janus Short-Term Bond Fund	9/1/92	110	7.40%	4.26%	N/A	3.37%

(1) Cumulative total return from December 29, 2000 (inception) to October 31, 2001.

(2) Cumulative total return from June 29, 2001 (inception) to October 31, 2001.

(3) Formerly, Janus Equity Income Fund.

Average annual total return after taxes on distributions and redemption assumes that (1) taxes are paid at the time of the distribution; (2) shares have been sold at the end of the measurement period; and (3) the long-term capital gains tax rate is applied on accumulated capital appreciation for all periods. If a capital loss would have occurred on liquidation, the loss is recorded as a tax benefit, increasing the return after taxes on distributions and redemption. The average annual return after taxes on distributions and redemption of each Fund, computed as of October 31, 2001, is shown in the table below:

Fund Name	*Date Available for Sale*	*Number of Months in Lifetime*	*Average Annual Total Return (After Taxes on Distributions and Redemption)*			
			One Year	*Five Years*	*Ten Years*	*Life of Fund*
Janus Enterprise Fund	9/1/92	110	(34.49)%	3.64%	N/A	10.38%
Janus Mercury Fund	5/3/93	102	(26.14)%	9.44%	N/A	13.45%
Janus Special Situations Fund	12/31/96	58	(19.80)%	N/A	N/A	9.45%
Janus Strategic Value Fund	2/29/00	20	(14.30)%	N/A	N/A	(6.93)%
Janus Orion Fund	6/30/00	16	(24.76)%	N/A	N/A	(30.24)%
Janus Fund 2	12/29/00	10	N/A	N/A	N/A	(19.31)%[1]
Janus Global Value Fund	6/29/01	4	N/A	N/A	N/A	(1.89)%[2]
Janus Core Equity Fund[3]	6/28/96	64	(11.47)%	11.38%	N/A	12.91%
Janus Growth and Income Fund	5/15/91	125.5	(15.96)%	11.91%	12.13%	13.54%
Janus Balanced Fund	9/1/92	110	(4.74)%	9.38%	N/A	10.56%

Janus Flexible Income Fund	7/7/87	172	7.46%	4.34%	5.58%	5.36%
Janus Federal Tax-Exempt Fund	5/3/93	102	7.17%	5.12%	N/A	5.06%
Janus High-Yield Fund	12/29/95	70	1.35%	2.88%	N/A	4.83%
Janus Short-Term Bond Fund	9/1/92	110	5.73%	4.11%	N/A	3.37%

(1) Cumulative total return from December 29, 2000 (inception) to October 31, 2001.

(2) Cumulative total return from June 29, 2001 (inception) to October 31, 2001.

(3) Formerly, Janus Equity Income Fund.

Quotations of a Fund's yield are based on the investment income per share earned during a particular 30-day period (including dividends, if any, and interest), less expenses accrued during the period ("net investment income"), and are computed by dividing net investment income by the net asset value per share on the last day of the period, according to the following formula:

$$YIELD = 2[(\frac{a - b}{cd} + 1)^6 - 1]$$

where a = dividend and interest income

b = expenses accrued for the period (net of reimbursements)

c = average daily

d = maximum net asset value per share on the last day of the period

The tax-equivalent yield used for Janus Federal Tax-Exempt Fund is the rate that an investor would have to earn from a fully taxable investment after taxes to equal the Fund's tax-free yield. Tax-equivalent yields are calculated by dividing a Fund's yield by the result of one minus a stated federal or combined federal and state tax rate. If only a portion of a Funds' yield is tax-exempt, only that portion is adjusted in the calculation. Janus Federal Tax-Exempt Fund may invest a portion of its assets in obligations that are subject to federal income tax. When the Fund invests in these obligations, its tax-equivalent yield will be lower.

The yield for the 30-day period ending October 31, 2001, for the Fixed-Income Funds is shown below:

Janus Flexible Income Fund	5.20%
Janus Federal Tax-Exempt	4.15%
Fund Janus High-Yield Fund	8.17%
Janus Short-Term Bond Fund	3.34%

From to time in advertisements or sales material, the Funds may discuss their performance ratings or other information as published by rec-

ognized mutual fund statistical rating services, including, but not limited to, Lipper Analytical Services, Inc., ("Lipper"), Ibbotson Associates, Micropal or Morningstar, Inc. ("Morningstar") or by publications of general interest such as *Forbes, Money, The Wall Street Journal, Mutual Funds Magazine, Kiplinger's*, or *Smart Money*. The Funds may also compare their performance to that of other selected Mutual funds (for example, peer groups created by Lipper or Morningstar), mutual fund averages or recognized stock market indicators, including, but not limited to, the Standard & Poor's 500 Composite Stock Price Index, the Standard & Poor's 400 Madcap Index, the Dow Jones Industrial Average, the Lehman Brothers Government/Credit Index, the Lehman Brothers 1-3 Year Government/Credit Index, the Lehman Brothers High Yield Index, the Lehman Brothers Municipal Bond Index, the Russell 2000 Index and the NASDAQ composite. In addition, the Funds may compare their total return or yield to the yield on U.S. Treasury obligations and to the percentage change in the Consumer Price Index. Such performance ratings or comparisons may be made with funds that may have different investment restrictions, objectives, policies or techniques than the Funds and such other funds or market indicators may be comprised of securities that differ significantly from the Funds' investments.

FINANCIAL STATEMENTS

DOCUMENTS INCORPORATED BY REFERENCE TO THE ANNUAL REPORTS

The following audited financial statements for the period ended October 31, 2001 are herby incorporated into this SAI by reference to the Funds' Annual Reports dated October 31, 2001:

Schedules of Investments as of October 31, 2001

Statements of Operations for the period ended October 31, 2001

Statement of Assets and Liabilities as of October 31, 2001

Statements of Changes in Net Assets for the periods ended October 31, 2001 and 2000

Financial Highlights for each of the periods indicated

Notes to Financial Statements

Reports of Independent Accountants

The portions of such Annual Reports that are not specifically listed above are not incorporated by reference into this SAI and are not part of the Registration Statement

APPENDIX A

EXPLANATION OF RATING CATEGORIES

The following is a description of credit ratings issued by two of the major credit rating agencies. Credit ratings evaluate only the safety of principal and interest payments, not the market value risk of lower quality securities. Credit rating agencies may fail to change credit ratings to reflect subsequent events on a timely basis. Although Janus Capital considers security ratings when making investment decisions, it also performs its own investment analysis and does not rely solely on the ratings assigned by credit agencies.

STANDARD & POOR'S
RATINGS SERVICES

Bond Rating	*Explanation*
Investment Grade	
AAA	Highest rating; extremely strong capacity to pay principal and interest.
AA	High quality, very strong capacity to pay principal and interest.
A	Strong capacity to pay principal and interest; somewhat more susceptible to the adverse effects of changing circumstances and economic conditions.
BBB	Adequate capacity to pay principal and interest; normally exhibit adequate protection parameters, but adverse economic conditions or changing circumstances more likely to lead to a weakened capacity to pay principal and interest than for higher rated bonds.
Non Investment Grade	Predominantly speculative
BB, B, CCC, CC, C	with respect to the issuer's capacity to meet required interest and principal payments. BB – lowest degree of speculation; C – the highest degree of speculation. Quality and protective characteristics outweighed by large uncertainties or major risk exposure to adverse conditions.
D	In default.

MOODY'S INVESTORS SERVICE, INC.

Bond Rating	*Explanation*
Investment Grade	
Aaa	Highest quality, smallest degree of risk.
Aa	High quality; together with Aaa bonds, they compose the high-grade bond group.
A	Upper-medium grade obligations; many favorable investment attributes.
Baa	Medium-grade obligations; neither highly protected nor poorly secured. Interest and principal appear adequate for the present but certain protective elements may be lacking or may be unreliable over any great length of time.
Non-Investment Grade	
Ba	More uncertain, with speculative elements. Protection of interest and principal payments not well safeguarded during good and bad times.
B	Lack characteristics of desirable investment; potentially low assurance of timely interest and principal payments or maintenance of other contract terms over time.
Caa	Poor standing, may be in default; elements of danger with respect to principal or interest payments.
Ca	Speculative in a high degree; could be in default or have

	other marked shortcomings.
C	Lowest-rated; extremely poor prospects of ever attaining investment standing.

Unrated securities will be treated as noninvestment grade securities unless a portfolio manager determines that such securities are the equivalent of investment grade securities. Securities that have received different ratings from more than one agency are considered investment grade if at least one agency has rated the security investment grade.

* * *

February 23, 2003

Growth
- Janus Fund
- Janus Enterprise Fund
- Janus Mercury Fund
- Janus Olympus Fund
- Janus Orion Fund

International/Global
- Janus Global Life Sciences Fund
- Janus Global Technology Fund
- Janus Global Value Fund
- Janus Worldwide Fund

Core
- Janus Balanced Fund
- Janus Core Equity Fund
- Janus Growth and Income Fund
- Janus Special Equity Fund

Risk-Managed
- Janus Risk-Managed Stock Fund

Janus Equity Funds

Prospectus

The Securities and Exchange Commission has not approved or disapproved of these securities or passed on the accuracy of this Prospectus. Any representation to the contrary is a criminal offense.

Janus Capital Management LLC ("Janus Capital") serves as investment advisor to each Fund. Janus Risk-Managed Stock Fund is subadvised by Enhanced Investment Technologies, LLC ("INTECH").

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RISK / RETURN SUMMARY

EQUITY FUNDS

The Funds are designed for long-term investors who primarily seek growth of capital and who tolerate the greater risks associated with common stock investments. Although Janus Balanced Fund and Janus Growth and Income Fund may also emphasize varying degrees of income, they are not designed for investors who desire a consistent level of income?

1. What are the investment objectives of the Funds?

Growth

- **Janus Fund** seeks long-term growth of capital in a manner consistent with the preservation of capital.
- **Janus Enterprise Fund, Janus Mercury Fund, Janus Olympus Fund and Janus Orion Fund** seek long-term growth of capital.

Global/International

- **Janus Global Life Sciences Fund, Janus Global Technology Fund and Janus Global Value Fund** seek long-term growth of capital.
- **Janus Worldwide Fund** seeks long-term growth of capital in a manner consistent with the preservation of capital.

Core

- **Janus Balanced Fund** seeks long-term capital growth, consistent with preservation of capital and balanced by current income.
- **Janus Core Equity Fund and Janus Special Equity Fund** seek long-term growth of capital.

- **Janus Growth and Income Fund** seeks long-term capital growth and current income.

Risk Managed

- **Janus Risk-Managed Stock Fund** seeks long-term growth of capital.

The Funds Trustees may change these objectives or/the Funds' principal investment policies without a shareholder vote. The Funds will notify you at least 60 days before making any material changes to their objectives or principal, investment policies. If there is a material change to a Fund's objective or principal investment policies, you should consider whether that Fund remains an appropriate investment for you. There is no guarantee that a Fund will meet its objective.

2. What are the main investment strategies of the Funds?

For all Funds except Janus Risk-Managed Stock Fund, the portfolio managers apply a "bottom up" approach in choosing investments. In other words, the Funds' portfolio managers look at companies one at a time to determine if a company is an attractive investment opportunity and consistent with a Fund's investment policies. If a portfolio manager is unable to find such investments, a Fund's uninvested assets may be held in cash or similar investments.

For Janus Risk-Managed Stock Fund, INTECH applies a mathematical portfolio management process to construct an investment portfolio for the Fund from a universe of common stocks. INTECH developed the formulas underlying this, mathematical process.

Within the parameters of its specific investment policies discussed below, each Fund may invest without limit in foreign equity and debt securities.

Within the parameters of its specific investment policies discussed below, each Fund will limit its investment in high-yield/high-risk bonds to less than 35% of its net assets (20% for Janus Special Equity Fund, Janus Risk-Managed Stock Fund and Janus Core Equity Fund).

Janus Fund invests primarily in common stocks selected for their growth potential. Although the Fund can invest in companies of any size, it generally invests in larger, more established companies. As of October 31, 2002, the Fund's weighted average market capitalization was $25.7 billion.

Janus Enterprise Fund invests primarily in common stocks selected for their growth potential, and normally invests at least 50% of its equity assets in medium-sized companies.

Janus Mercury Fund invests primarily in common stocks selected for their growth potential. The Fund may invest in companies of any larger, well-established companies to smaller, emerging growth companies.

Janus Olympus Fund invests primarily in common stocks selected for their growth potential. The Fund may invest in companies of any size, from larger, well-established companies to smaller, emerging growth companies.

Janus Orion Fund invests primarily in common stocks selected for their growth potential. The Fund may invest in companies of any size,

from larger, well-established companies to smaller, emerging growth companies. The Fund normally concentrates its investments in a core group of 20-30 common stocks.

Janus Global Life Sciences Fund invests, under normal circumstances, at least 80% of its net assets in securities of companies that the portfolio manager believes, have a life science orientation. It implements this policy by investing primarily in equity securities of U.S. and foreign companies selected for their growth potential. As a fundamental policy, the Fund normally invests at least 25% of its total assets, in the aggregate, in the following industry groups: health care; pharmaceuticals; agriculture; cosmetics/personal care; and biotechnology.

Janus Global Technology Fund invests, under normal circumstances, at least 80% of its net assets in securities of companies that the portfolio manager believes will benefit significantly from advances or improvements in technology. It implements this policy by investing primarily in equity securities of U.S. and foreign companies selected for their growth potential.

Janus Global Value Fund invests primarily in common stocks of companies of any size located throughout the world with the potential for long-term growth of capital using a "value" approach. The "value" approach emphasizes investments in companies the portfolio manager believes are undervalued relative to their intrinsic worth. The Fund normally invests in issuers from at least five different countries, which may include the United States. The Fund may, under un-

usual circumstances, invest in fewer than five countries or even in a single country.

Janus Worldwide Fund invests primarily in common stocks of companies of any size located throughout the world. The Fund normally invests in issuers from at least five different countries, which may include the United States. The Fund may under unusual circumstances, invest in fewer than five countries or even in a single country.

Janus Balanced Fund normally invests 40-60% of its assets in securities selected primarily for their, growth potential and 40-60% of its assets in securities selected primarily for their income potential. The Fund will normally invest at least 25% of its assets in fixed-income senior securities.

Janus Core Equity Fund invests, under normal circumstances, at least 80% of its net assets in equity securities selected for their growth potential. Eligible equity securities include domestic and foreign common stocks; preferred stocks; securities convertible into common stocks or preferred stocks such as convertible preferred stocks, bonds and debentures; and other securities with equity characteristics. The Fund may invest in companies of any size.

Janus Growth and Income Fund normally emphasizes investments in common stocks. It will normally invest up to 75% of its assets in equity securities selected primarily for their growth potential, and at least 25% of its assets in securities the portfolio manager believes have income potential.

Janus Special Equity Fund invests, under normal circumstances, at least 80% of its net assets in equity securities with the potential for long-term growth of capital. The portfolio manager emphasizes investments in companies with attractive price/free cash flow, which is the relationship between the price of a stock and the company's available cash from operations, minus capital expenditures. The portfolio manager will typically seek attractively valued companies that are improving their free cash flow and returns on invested capital. These companies may also include special situations companies that are experiencing management changes and/or are temporarily out of favor.

Janus Risk-Managed Stock Fund invests, under normal circumstances, at least 80% of its net assets in common stocks selected for their growth potential. The primary aid of the strategy is to outperform the Fund's benchmark index.

Janus Risk-Managed Stock Fund pursues its objective by applying a mathematical portfolio management process to construct an investment portfolio from the universe of common stocks within its benchmark index. The mathematical process uses the natural tendency of stock prices to vary over time (volatility) in determining the selection of securities and their weightings in the Fund's holdings. INTECH pursues its goal by identifying stocks with higher average volatility than the Fund's benchmark index and combining those stocks in a manner that the subadviser believes does not increase the overall portfolio volatility above that of the benchmark index. IN-

TECH seeks to select stocks with higher average volatility than the benchmark index by reviewing historical stock prices and estimating future volatility. More volatile stocks may tend to reside on the smaller cap end of the index. INTECH approaches risk management from a perspective that evaluates risk relative to a direct investment in the benchmark index. Risk controls are designed to minimize the risk of significant underperformance relative to the benchmark index.

For purposes of the Funds' 80% policies, net assets will take into account borrowings for investment purposes.

3. What are the main risks of investing in the Funds?

The biggest risk is that the Funds' returns may vary, and you could lose money. The Funds are each designed for long-term investors who can accept the risks of investing in a portfolio with significant common stock holdings. Common stocks tend to be more volatile than other investment choices.

The value of a Fund's portfolio may decrease if the value of an individual company in the portfolio decreases or, in the case of Janus Global Value Fund, if the portfolio manager's belief about a company's intrinsic worth is incorrect. The value of a Fund's portfolio could also decrease if the stock market goes down. If the value of a Fund's portfolio decreases, a Fund's net asset value (NAV) will also decrease, which means if you sell your shares in a Fund you may get back less money.

The income component of Janus Balanced Fund's and Janus Growth and Income Fund's portfolios includes fixed-income securities. A fundamental risk of these securities is that their value will fall if interest rates rise. Since the value of a fixed-income portfolio will generally decrease when interest rates rise, the Fund's NAV may likewise decrease. Another fundamental risk associated with fixed-income securities is credit risk, which is the risk that an issuer will be unable to make principal and interest payments when due.

Janus Enterprise Fund, Janus Olympus Fund, Janus Orion Fund, Janus Global Technology Fund, Janus Global Value Fund and Janus Special Equity Fund are classified as nondiversified. This means they may hold larger positions in a smaller number of securities than a fund that is classified as diversified. As a result, a single security's increase or decrease in value may have a greater impact on a Fund's NAV and total return.

Janus Global Life Sciences Fund, Janus Global Technology Fund, Janus Global Value Fund and Janus Worldwide Fund may have significant exposure to foreign markets. As a result, their returns and NAV may be affected to a large degree by fluctuations in currency exchange rates or political or economic conditions in a particular country.

Janus Global Life Sciences Fund concentrates its investments in related industry groups. Because of this, companies in its portfolio may share common characteristics and react similarly to market developments. For example, many companies with a life science orientation are

highly regulated and may be dependent upon certain types of technology. As a result, changes in government funding or subsidies, new or anticipated legislative changes, or technological advances could affect the value of such companies and, therefore, the Fund's NAV. The Fund's returns may be more volatile than those of a less concentrated portfolio.

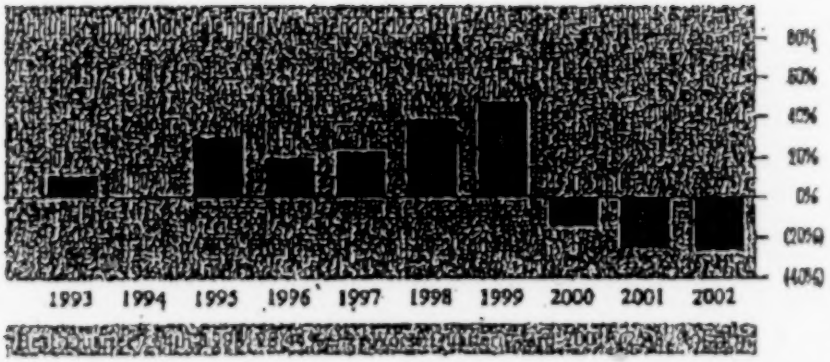
Although **Janus Global Technology Fund** does not concentrate its investments in specific industries, it may invest in companies related in such a way that they react similarly to certain market pressures. For example, competition among technology companies may result in increasingly aggressive pricing of their products and services, which may affect the profitability of companies in the Fund's portfolio. In addition, because of the rapid pace of technological development, products or services developed by companies in the Fund's portfolio may become rapidly obsolete or have relatively short product cycles. As a result, the Fund's returns may be considerably more volatile than the returns of a fund that does not invest in similarly related companies.

For **Janus Risk-Managed Stock Fund**, the proprietary mathematical process used by INTECH may not achieve the desired results. Additionally, the rebalancing techniques used by INTECH may result in a higher portfolio turnover rate and related expenses compared to a "buy and hold" or index fund strategy. A higher portfolio turnover rate increases the likelihood of higher net taxable gains or losses for you as an investor. There is a risk that if INTECH's

method of identifying stocks with higher volatility than the benchmark or their method of identifying stocks that tend to move in the same or opposite direction does not result in selecting stocks with continuing volatility and covariance as anticipated, the Fund may not outperform the benchmark index. An investment in these Funds is not a bank deposit and is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency.

The following information provides some indication of the risks of investing in the Funds by showing how each Fund's performance has varied over time. The bar charts depict the change in performance from year to year during the period indicated. The tables compare each Fund's average annual returns for the periods indicated to a broad-based securities market index or indices.

Janus Fund

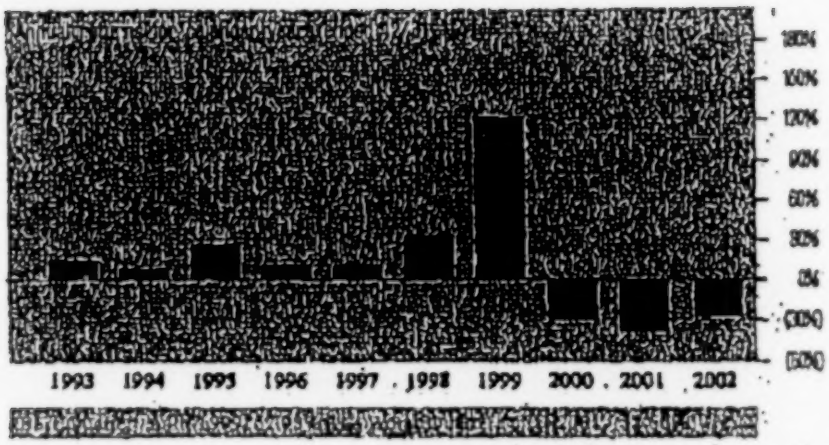


	Average annual total return for periods ended 12/31/02			
	1 year	*5 years*	*10 years*	*Since Inception (2/5/70)*
Janus Fund				
Return Before Taxes	(27.56%)	(1.42%)	6.85%	13.91%
Return After Taxes on Distributions	(27.56%)	(2.51%)	4.87%	10.65%
Return After Taxes on Distributions and Sale of Fund Shares*	(16.92%)	(0.51%)	5.50%	10.64%
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	(0.58%)	9.34%	11.07%

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

Janus Enterprise Fund



Average annual total return for periods ended 12/31/02

	1 year	*5 years*	*10 years*	*Since Inception (9/1/92)*
Janus Enterprise Fund				
Return Before Taxes	(28.28%)	(2.34%)	5.83%	8.33%
Return After Taxes on Distributions	(28.28%)	(3.08%)	4.66%	7.17%
Return After Taxes on Distributions and Sale of Fund Shares*	(17.36%)	(1.60%)	4.70%	6.90%
Russell Midcap Growth Index† (reflects no deduction for expenses or taxes)	(27.41%)	(1.82%)	6.71%	7.29%

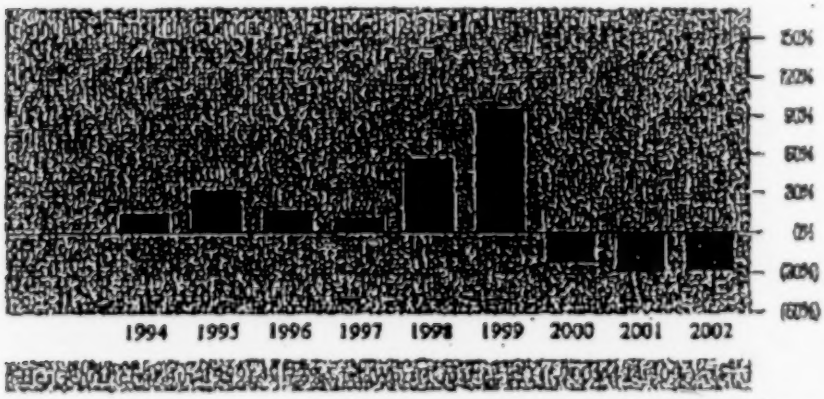
S&P Midcap 400 Index‡ (reflects no deduction for expenses or taxes)	(14.51%)	6.41%	11.96%	12.91%

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† Effective February 28, 2003, Janus Enterprise Fund changed its primary benchmark from the S&P MidCap 400 Index to the Russell Midcap Growth Index. The performance of this index more closely correlates to the Fund's performance than the S&P Midcap Index with a greater-than-average grown orientation. The Russell Midcap Index consists of the smallest 800 companies in the Russell 1000 Index, as ranked by total market capitalization. The Fund will retain the S&P MidCap 400 Index as a secondary index.

‡ The S&P MidCap 400 Index is an unmanaged group of 400 domestic stocks chosen for their market size, liquidity and industry group representation.

Janus Mercury Fund



Average annual total return for periods ended 12/31/02

	Since Inception

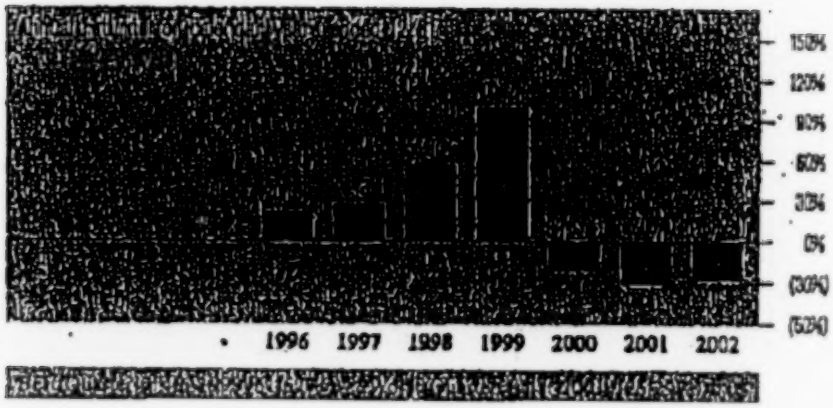
	1 year	*5 years*	*(5/3/93)*
Janus Mercury Fund			
Return Before Taxes	(29.00%)	3.66%	11.68%
Return After Taxes on Distributions	(29.00%)	2.04%	9.25%
Return After Taxes on Distributions and Sale of Fund Shares*	(17.81%)	3.30%	9.33%
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	(0.58%)	9.47%
Russell 1000 Growth Index‡ (reflects no deduction for expenses or taxes)	(27.88%)	(3.84%)	7.49%

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

‡ The Russell 1000 Growth Index contains those securities in the Russell 1000 Index with a greater-than-average growth orientation. Companies in this index tend to exhibit higher price-to-book and price-earnings ratios, lower dividend yields, and higher forecasted growth values.

Janus Olympus Fund



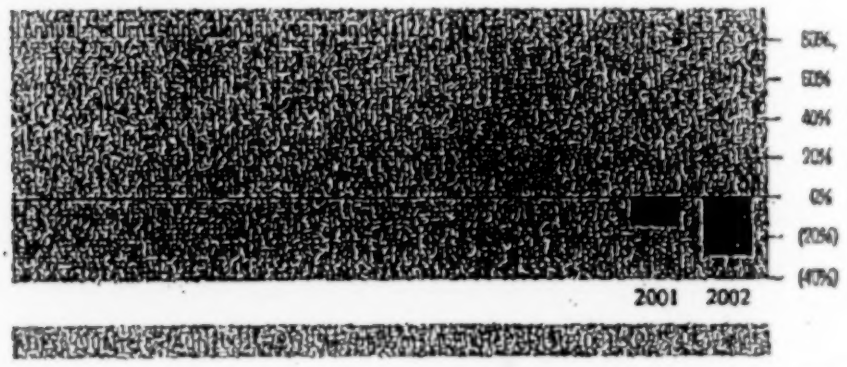
	Average annual total return for periods ended 12/31/02		
	1 year	*5 years*	*Since Inception (12/29/95)*
Janus Olympus Fund			
Return Before Taxes	(28.19%)	3.74%	9.20%
Return After Taxes on Distributions	(29.00%)	3.44%	8.70%
Return After Taxes on Distributions and Sale of Fund Shares*	(17.31%)	3.17%	7.66%
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	(0.58%)	6.87%
Russell 1000 Growth Index‡ (reflects no deduction for expenses or taxes)	(27.88%)	(3.84%)	4.06%

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

‡ The Russell 1000 Growth Index contains those securities in the Russell 1000 Index with a greater-than-average growth orientation. Companies in this index tend to exhibit higher price-to-book and price-earnings ratios, lower dividend yields, and higher forecasted growth values.

Janus Orion Fund



	Average annual total return for periods ended 12/31/02	
	1 year	*Since Inception (6/30/00)*
Janus Orion Fund		
Return Before Taxes	(29.77%)	(29.20%)
Return After Taxes on Distributions	(29.77%)	(29.23%)
Return After Taxes on Distributions and Sale of Fund Shares*	(18.28%)	(22.00%)
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	(17.05%)

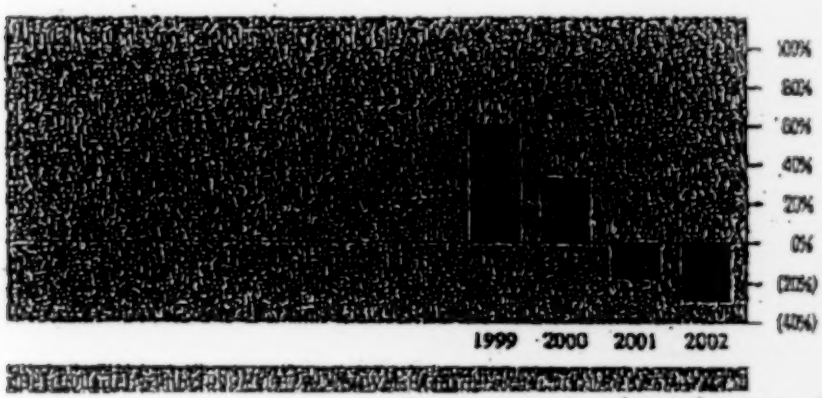
Russell 1000 Growth Index‡ (reflects no deduction for expenses or taxes)	(27.88%)	(28.84%)

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

‡ The Russell 1000 Growth Index contains those securities in the Russell 1000 Index with a greater-than-average growth orientation. Companies in this index tend to exhibit higher price-to-book and price-earnings ratios, lower dividend yields, and higher forecasted growth values.

Janus Global Life Sciences Fund



Average annual total return for periods ended 12/31/02

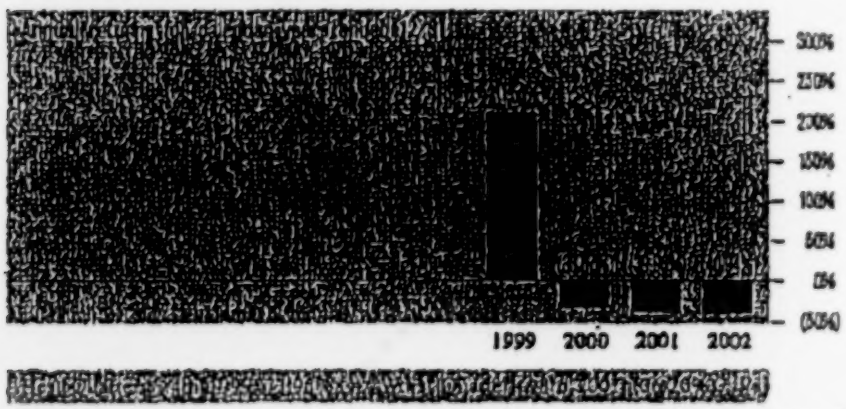
	1 year	*Since Inception (12/31/98)*
Janus Global Life Sciences Fund		
Return Before Taxes	(30.11%)	5.29%
Return After Taxes on Distributions	(30.11%)	5.28%

Return After Taxes on Distributions and Sale of Fund Shares*	(18.49%)	4.29%
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	(24.47%)

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

Janus Global Technology Fund



Average annual total return for periods ended 12/31/02

	1 year	*Since Inception (12/31/98)*
Janus Global Technology Fund		
Return Before Taxes	(40.94%)	(7.48%)
Return After Taxes on Distributions	(40.94%)	(7.68%)
Return After Taxes on Distributions and Sale of Fund Shares*	(25.14%)	(5.79%)
S&P 500 Index†	(22.09%)	(24.47%)

(reflects no deduction for fees, expenses or taxes)

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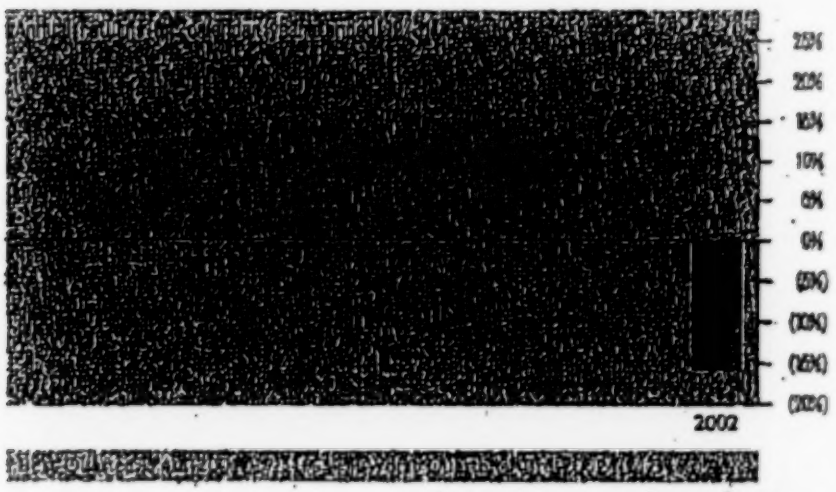
* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common prices.

Janus Global Value Fund



Average annual total return for periods ended 12/31/02

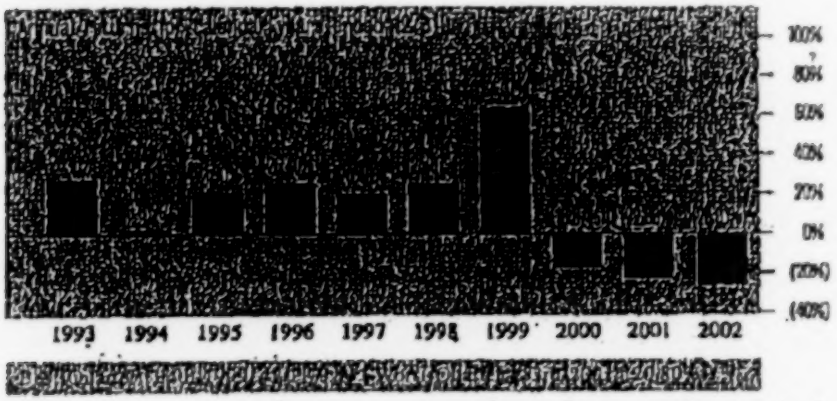
	1 year	*Since Inception (6/29/01)*
Global Value Fund		
Return Before Taxes	(15.91%)	(6.61%)
Return After Taxes on Distributions	(16.05%)	(6.76%)
Return After Taxes on Distributions and Sale of Fund Shares*	(9.77%)	(5.33%)
Morgan Stanley Capital International World Index†	(19.89%)	(17.83%)

(reflects no deduction for fees, expenses or taxes)

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The Morgan Stanley Capital International World Index is a market capitalization weighted index composed of companies representative of the market structure of 23 Developed Market countries in North America, Europe and the Asia/Pacific Region.

Janus Worldwide Fund



Average annual total return for periods ended 12/31/02

	1 year	*5 years*	*10 years*	*Since Inception (5/15/91)*
Janus Worldwide Fund				
Return Before Taxes	(26.01%)	(0.38%)	9.26%	10.74%
Return After Taxes on Distributions	(26.28%)	(0.99%)	7.99%	9.60%

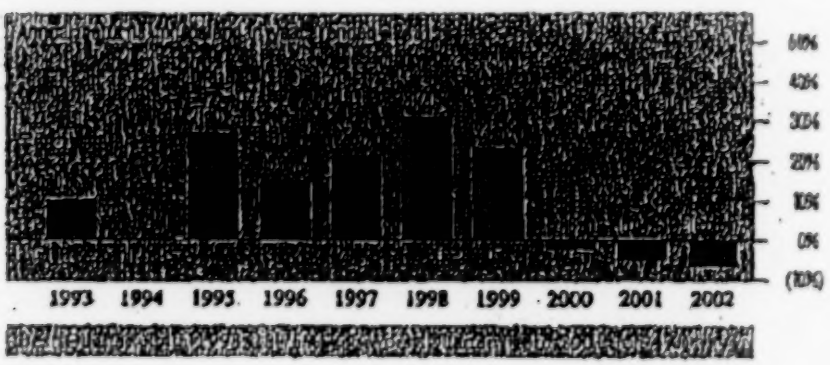
Return After Taxes on Distributions and Sale of Fund Shares*	(15.97%)	(0.04%)	7.56%	8.99%
Morgan Stanley Capital International World Index† (reflects no deduction for fees, expenses or taxes)	(19.89%)	(2.11%)	6.26%	5.49%

* The return after taxes on distributions is higher than the return before taxes because of the effect of foreign tax credits.

** If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The Morgan Stanley Capital International World Index is a market capitalization weighted index composed of companies representative of the market structure of 23 Developed Market countries in North America, Europe and the Asia/Pacific Region.

Janus Balanced Fund



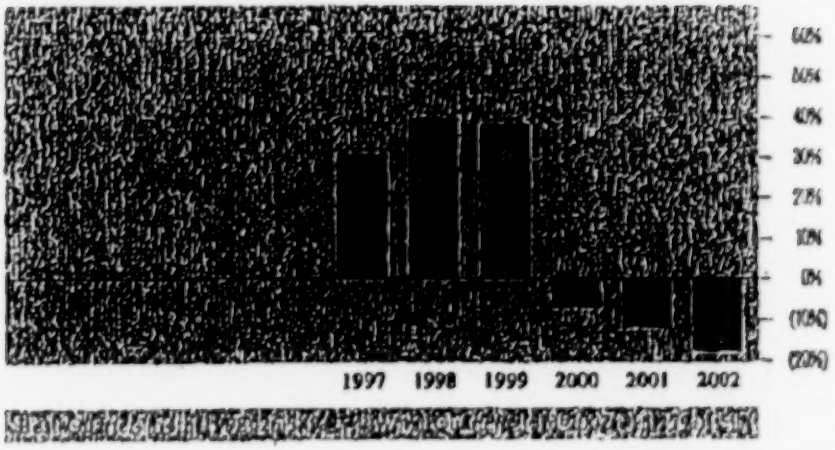
	Average annual total return for periods ended 12/31/02			
	1 year	*5 years*	*10 years*	*Since Inception (9/1/92)*
Janus Balanced Fund				
Return Before Taxes	(6.56%)	7.06%	10.77%	11.68%
Return After Taxes on Distributions	(7.48%)	5.71%	8.62%	9.57%
Return After Taxes on Distributions and Sale of Fund Shares*	(4.02%)	5.25%	8.00%	8.85%
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	(0.58%)	9.34%	9.67%
Lehman Brothers Gov't/Credit Index† (reflects no deduction for expenses or taxes)	11.04%	7.62%	7.61%	7.51%

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

† Lehman Brothers Gov't/Credit Index is composed of all bonds that are of investment grade with at least one year until maturity.

Janus Core Equity Fund



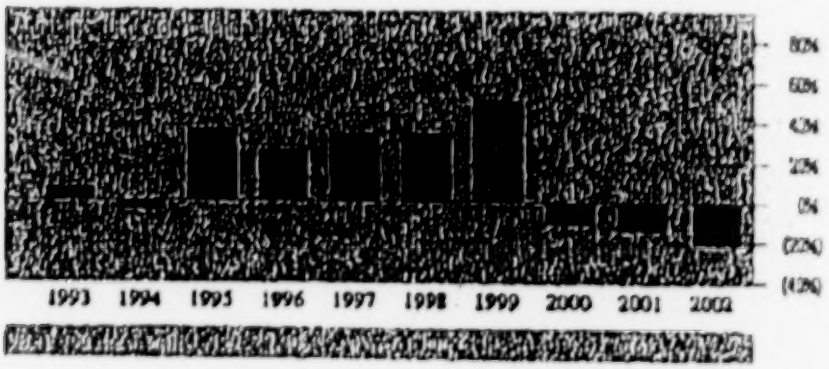
Average annual total return for periods ended 12/31/02

	1 year	*5 years*	*Since Inception (6/28/96)*
Janus Core Equity Fund			
Return Before Taxes	(18.02%)	5.35%	10.95%
Return After Taxes on Distributions	(18.25%)	4.34%	9.39%
Return After Taxes on Distributions and Sale of Fund Shares*	(11.06%)	4.29%	8.65%
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	0.58%	5.84%

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

Janus Growth and Income Fund



Average annual total return for periods ended 12/31/02

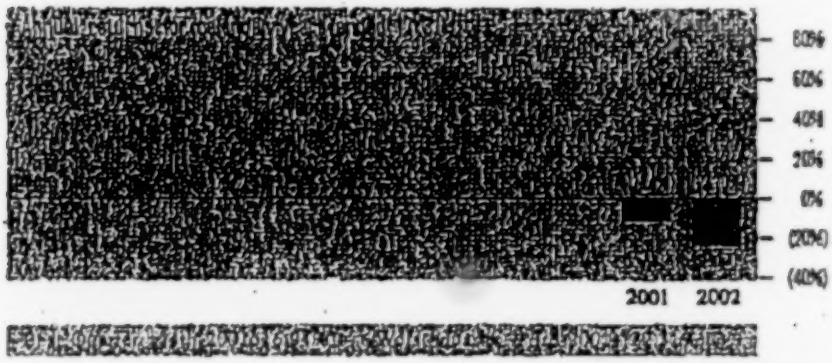
	1 year	*5 years*	*10 years*	*Since Inception (5/15/91)*
Janus Growth and Income Fund				
Return Before Taxes	(21.51%)	3.96%	11.05%	12.95%
Return After Taxes on Distributions	(21.74%)	3.06%	9.29%	11.36%
Return After Taxes on Distributions and Sale of Fund Shares*	(13.20%)	3.28%	8.75%	10.65%
S&P 500 Index†	(22.09%)	(0.58%)	9.34%	10.02%

(reflects no deduction for expenses or taxes)	

* If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

*Janus Special Equity Fund**



Average annual total return for periods ended 12/31/02

	1 year	*Since Inception (2/29/00)*
Janus Special Equity Fund		
Return Before Taxes	(23.70%)	(10.68%)
Return After Taxes on Distributions	(23.72%)	(11.02%)
Return After Taxes on Distributions and Sale of Fund Shares*	(14.55%)	(8.48%)
S&P 500 Index† (reflects no deduction for expenses or taxes)	(22.09%)	(13.19%)

* Formerly, Janus Strategic Value Fund.

** If the Fund incurs a loss, which generates a tax benefit, the return after taxes on distributions and sale of Fund shares may exceed the Fund's other return figures.

† The S&P 500 is the Standard & Poor's Composite Index of 500 Stocks, a widely recognized, unmanaged index of common stock prices.

Since Janus Risk-Managed Stock Fund did not commence operations until February 28, 2003, performance information is not included for this Fund. The performance of this Fund will be compared to the S&P 500 Index, which is the Fund's benchmark index.

After-tax returns are calculated using the historical highest individual federal marginal income tax rates and do not reflect the impact of state and local taxes. Actual after-tax returns depend on your individual tax situation and may differ from those shown in the preceding tables. The after-tax information above does not apply to Fund shares held through a tax-deferred account, such as a 401(k) plan or IRA.

The Funds' past performance (before and after taxes) does not necessarily indicate how they will perform in the future.

FEES AND EXPENSES

The following tables describe the fees and expenses that you may pay if you buy and hold shares of the Funds. The expenses shown are based upon gross expenses (without the effect of expense offset arrangements). All of the fees and expenses shown, except as noted, were determined based on net assets as of the fiscal year ended October 31, 2002.

Shareholder fees, such as sales loads, redemption fees or exchange fees, are charged directly to an investor's account. The Janus funds are no-load investments, so you will generally not pay any shareholder fees when you buy or sell shares of the Funds. However, if you sell shares of Janus Global Life Sciences Fund, Janus Global Technology Fund, Janus Global Value Fund, Janus Worldwide Fund or Janus Risk-Managed Fund that you have held for 3-months or less you may pay a redemption fee.

Shareholder Fees (paid directly from your investment)

Sales Charge	None
Redemption Fee on shares of Janus Global Life Sciences, Janus Global Technology Fund, Janus Global Value Fund, Janus Worldwide Fund and Janus Risk-Managed Stock Fund held 3 months or less (as a % of amount redeemed).*	1.00%

* The redemption fee may be waived in certain circumstances, as described in the Shareholders' Guide. For Fund shares held through certain intermediates, the redemption fee will be charged in generally the same manner as for shares held directly with the Fund. However, the intermediaries' methods for tracking and calculating the fee may differ in some respects from the Funds'.

Annual fund operating expenses are paid out of a Fund's assets and include fees for portfolio management, maintenance of shareholder accounts, shareholder servicing, accounting and other services. You do not pay these fees directly but, as the example on the next page shows, these costs are borne indirectly by all shareholders.

	Management Fee	*Other Expenses*	*Total Annual Fund Operating Expenses*
Janus Fund	0.65%	0.20%	0.85%
Janus Enterprise Fund	0.65%	0.28%	0.93%
Janus Mercury Fund	0.65%	0.29%	0.94%
Janus Olympus Fund	0.65%	0.29%	0.94%
Janus Orion Fund	0.65%	0.44%	1.09%
Janus Global Life Sciences Fund	0.65%	0.24%	0.89%
Janus Global Technology Fund	0.65%	0.31%	0.96%
Janus Global Value Fund	0.65%	0.54%	1.19%
Janus Worldwide Fund	0.65%	0.22%	0.87%
Janus Balanced Fund	0.65%	0.21%	0.86%
Janus Core Equity Fund	0.65%	0.27%	0.92%
Janus Growth and Income Fund	0.65%	0.25%	0.90%
Janus Special Equity Fund*	0.65%	0.36%	1.01%
Janus Risk-Managed Stock Fund	0.65%	0.61%[1]	1.26%

* Formerly, Janus Strategic Value Fund.

(1) Since the Fund had not commenced operations as of October 31, 2002, "Other Expenses" are based on the estimated expenses that the Fund expects to incur in its initial fiscal year.

EXAMPLE:

This example is intended to help you compare the cost of investing in the Funds with the cost of investing in other mutual funds. The example assumes that you invest $10,000 in each of the Funds for the time periods indicated and then redeem all of your shares at the end of those periods. The example also assumes that your investment has a 5% return each year and that the Funds' operating expenses remain the same. Although your actual costs may be higher or lower, based on these assumptions your costs would be:

	1 Year	*3 Years*	*5 Years*	*10 Years*
Janus Fund	$ 87	$271	$471	$1,049
Janus Enterprise Fund	$ 95	$296	$515	$1,143
Janus Mercury Fund	$ 96	$300	$520	$1,155
Janus Olympus Fund	$ 96	$300	$520	$1,155
Janus Orion Fund	$111	$347	$601	$1,329
Janus Global Life Sciences Fund	$ 91	$284	$493	$1,096
Janus Global Technology Fund	$ 98	$306	$531	$1,178
Janus Global Value Fund	$121	$378	$654	$1,443
Janus Worldwide Fund	$ 89	$278	$482	$1,073
Janus Balanced Fund	$ 88	$274	$477	$1,061
Janus Core Equity Fund	$ 94	$293	$509	$1,131
Janus Growth and Income Fund	$ 92	$287	$498	$1,108
Janus Special Equity Fund*	$103	$322	$558	$1,236
Janus Risk-Managed Stock Fund	$128	$400	N/A	N/A

* Formerly, Janus Strategic Value Fund.

INVESTMENT OBJECTIVES, PRINCIPAL INVESTMENT STRATEGIES AND RISKS

This section takes a closer look at the investment objectives of each of the Funds, their principal investment strategies and certain risks of investing in the Funds. Strategies and policies that are noted as "fundamental" cannot be changed without a shareholder vote.

Please carefully review the "Risks" section of this Prospectus for a discussion of risks associated with certain investment techniques. We've also included a Glossary with descriptions of investment terms used throughout this Prospectus.

INVESTMENT OBJECTIVES AND PRINCIPAL INVESTMENT STRATEGIES

Janus Fund

Janus Fund seeks long-term growth of capital in a manner consistent with the preservation of capital. It pursues its objective by investing primarily in common stocks selected for their growth potential. Although the Fund can invest in companies of any size, it generally invests in larger, more established companies.

Janus Enterprise Fund

Janus Enterprise Fund seeks long-term growth of capital. It pursues its Objective by investing primarily in common stocks selected for their growth potential, and normally invests at least 50% of its equity assets in medium-sized companies. Medium-sized companies are those whose market capitalization falls within the range of companies in the Russell Midcap Growth Index. Market capitalization is a commonly used meas-

ure of the size and value of a company. The market capitalizations within the Index will vary, hut as of December 31, 2002, they ranged from approximately $224 million to $13.5 billion.

Janus Mercury Fund

Janus Mercury Fund seeks long-term growth of capital. It pursues its objective by investing primarily in common stocks selected for their growth potential. The Fund may invest in companies of any size, from larger, well-established companies to smaller, emerging growth companies.

Janus Olympus Fund

Janus Olympus Fund seeks long-term growth of capital. It pursues its objective by investing primarily in common stocks selected for their growth potential. The Fund may invest in companies of any size, from larger, well-established companies to smaller, emerging growth companies.

Janus Orion Fund

Janus Orion Fund seeks long-term growth of capital. It pursues its objective by investing primarily in common stocks selected for their growth potential. The Fund may invest in companies of any size, from larger, well-established companies to smaller, emerging growth companies. The Fund normally concentrates its investments in a core group of 20-30 common stocks.

Janus Global Life Sciences Fund

Janus Global Life Sciences Fund seeks long-term growth of capital. It invests, under normal cir-

cumstances, at least 80% of its net assets in securities of companies that the portfolio manager believes have a life science orientation. Generally speaking, the "life sciences" relate to maintaining or improving quality of life. So, for example, companies with a "life science orientation" include companies engaged in research, development, production or distribution of products or services related to health and personal care, medicine or pharmaceuticals. It implements this policy by investing primarily in equity securities of U.S. and foreign companies selected for their growth potential. As a fundamental policy, the Fund normally invests at least 25% of its total assets, in the aggregate, in the following industry groups: health care; pharmaceuticals; agriculture; cosmetics/personal care; and biotechnology.

Janus Global Technology Fund

Janus Global Technology Fund seeks long-term growth of capital. It invests, under normal circumstances, at least 80% of its net assets in securities of companies that the portfolio manager believes will benefit significantly from advances or improvements in technology. These companies generally fall into two categories:

a. Companies that the portfolio manager believes have or will develop products, processes or services that will provide significant technological advancements or improvements; and

b. Companies that the portfolio manager believes rely extensively on technology in connection with their operations or services.

It implements this policy by investing primarily inequity securities of U.S. and foreign companies selected for their growth potential.

Janus Global Value Fund

Janus Global Value Fund seeks long-term growth of capital. It pursues its objective by investing primarily in common stocks of companies of any size located throughout the world with the potential for long term growth of capital using a "value" approach. The "value" approach the portfolio manager uses emphasizes investments in companies he believes are undervalued relative to their intrinsic worth. The Fund normally invests in issuers from at least five different countries, including the United States. The Fund may at times invest in fewer than five countries or even a single country.

The portfolio manager measures value as a function of price/free cash flow. Price/free cash flew is the relationship between the price of a stock and its available cash front operations minus capital expenditures.

The portfolio manager will typically seek attractively valued companies that are improving their free cash flow and improving their returns on invested capital. The companies may also include special situations companies that are experiencing management changes and/or are temporarily out of favor.

Janus Worldwide Fund

Janus Worldwide Fund seeks long-term growth of capital in a manner consistent with the preservation of capital. It pursues its objective by investing primarily in common stocks of companies

of any size located throughout the world. The Fund normally invests in issuers from at least five different countries, including the United States. The Fund may at times invest in fewer than five countries or even a single country.

Janus Balanced Fund

Janus Balanced Fund seeks long-term growth, consistent with preservation of capital and balanced by current income. It pursues its objective by normally investing 40-60% of its assets in securities selected primarily for their growth potential and 40-60% of its assets in securities selected primarily for their income potential. This Fund normally invests at least 25% of its assets in fixed-income senior securities.

Janus Core Equity Fund

Janus Core Equity Fund seeks long-term growth of capital. It pursues its objective by investing, under normal circumstances, at least 80% of its net assets in equity securities selected for their growth potential. Eligible securities include domestic and foreign common stocks; preferred stocks; securities convertible into common stocks or preferred stocks such as convertible preferred stocks, bonds and debentures; and other securities with equity characteristics.

Janus Growth and Income Fund

Janus Growth and Income Fund seeks long-term capital growth and current income. It pursues its objective by normally emphasizing investments in common stocks. It will normally invest up to 75% of its assets in equity securities selected primarily for their growth potential, and at least 25% of its assets in securities the portfo-

lio manager believes have income potential. Equity securities may make up part of this income component if they currently pay dividends or the portfolio manager believes they have potential for increasing or commencing dividend payments. Because of this investment strategy, the Fund is not designed for investors who need consistent income.

Janus Special Equity Fund

Janus Special Equity Fund seeks long-term growth of capital. It pursues its objective by investing, under normal circumstances, at least 80% of its net assets in equity securities with the potential for long-term growth of capital. The portfolio manager emphasizes investments in companies with an attractive price/free cash flow, which is the relationship between the price of a stock and the Company's available cash from operations, minus capital expenditures. The portfolio manager will typically seek attractively valued companies that are improving their free cash flow and returns on invested capital. These companies may also include special situations companies that are experienced management changes and/or are temporarily out of favor.

Janus Risk-Managed Stock Fund

Janus Risk-Managed Stock Fund seeks long-term growth of capital. It pursues its objective by investing, under normal circumstances, at least 80% of its net assets in common stocks selected for their growth potential. Janus Risk-Managed Stock Fund pursues its objective by applying a mathematical portfolio management process to construct an investment portfolio from a universe of common stocks within its bench-

mark index. The mathematical process uses the natural tendency of stock prices to vary over time (volatility) in determining the selection of securities and their weightings in the Fund's holdings. The primary aim of this strategy is to outperform the Fund's benchmark index. The Fund's subadviser pursues this, goal by constructing portfolios of stocks with higher average stock volatility than the Fund's benchmark index and combining those stocks in a manner that the subadviser believes does not increase the overall portfolio volatility above that of the benchmark index. INTECH seeks to select stocks with higher, average volatility than the benchmark index by reviewing historical stock prices and estimating future volatility. More volatile stocks may tend to reside on the smaller cap end of the index. The Fund's subadviser approaches risk management from a perspective that evaluates risk relative to a direct investment in the benchmark index. Risk controls are designed to minimize the risk of significant underperformance relative to the benchmark index.

The following questions and answers are designed to help you better understand the Funds' principal investment strategies.

1. How are common stocks selected?

Consistent with its investment objective and policies, each of the Funds except Janus Risk-Managed Stock Fund, may invest substantially all of its assets in common stocks if its portfolio manager believes that common stocks will appreciate in value. The portfolio managers generally take a "bottom up" approach to selecting companies. This means that they seek to identify indi-

vidual companies with earnings growth potential that may not be recognized by the market at large. The portfolio managers make this assessment by looking at companies one at a time, regardless of size, country of organization, place of principal business activity, or other similar selection criteria. The portfolio managers may sell a fund holding if, among other things, the security reaches the portfolio managers' price target, if the company has a deterioration of fundamentals such as failing to meet key operating benchmarks or if the portfolio managers find a better investment opportunity. The portfolio managers may also sell a Fund holding to meet redemptions.

In the case of Janus Global Value Fund, the portfolio manager will typically seek attractively valued companies that are improving their free cash flow and improving their returns on invested capital. This "value" approach emphasizes investments in companies that the portfolio manager believes are undervalued relative to their intrinsic worth and have the potential for long-term growth of capital.

Janus Balanced Fund and Janus Growth and Income Fund may each emphasize varying degrees of income. Realization of income is not a significant consideration when choosing investments for the other Funds. Income realized on the Funds' investments may be incidental to their objectives. In the case of Janus Growth and Income Fund and Janus Balanced Fund, a portfolio manager may consider dividend-paying characteristics to a greater degree in selecting common stock.

Janus Special Equity Fund emphasizes investments in companies with attractive prices compared to their fee cash flow. The portfolio manager will typically seek attractively valued companies that are improving their free cash flow and returns on invested capital. These companies may also include special situations companies that are experiencing management changes and/or are temporarily out of favor.

INTECH applies a mathematical portfolio management process to construct an investment portfolio for the Fund from a universe of common stocks. INTECH developed the formulas underlying this mathematical process.

The mathematical process is designed to take advantage of market volatility (variation in stock prices), rather than using research or market/economic trends to predict the future returns of stocks. The process seeks to generate a return in excess of the Fund's benchmark over the long term, while controlling the risk relative to the benchmark. The mathematical process involves:

- selecting stocks primarily from stocks within the Fund's benchmark;
- periodically determining an optimal weighting of the stocks and rebalancing to the optimal weighting; and
- monitoring the total risk and volatility of the Fund's holdings with respect to the benchmark index.

INTECH seeks to outperform the benchmark index through its mathematical process. INTECH seeks to identify those stocks in a manner that does not increase the overall portfolio volatility

above that of the benchmark index. More volatile stocks may tend to reside on the smaller cap end of the benchmark index. INTECH employs risk controls designed to minimize the risk of significant under performance relative to the benchmark index.

The Fund may use exchange traded funds, as well as futures, options and other derivatives to gain exposure to the stock market pending investment of cash valances or to meet liquidity needs.

2. Are the same criteria used to select foreign securities?

Generally, yes. The portfolio managers seek companies that meet their selection criteria, regardless of where a company is located. Foreign securities are generally selected on a stock-by-stock basis without regard to any defined allocation among countries or geographic regions. However, certain factors such as expected levels of inflation, government policies influencing business conditions, the outlook for currency relationships and prospects for economic growth among countries, regions or geographic areas may warrant greater consideration in selecting foreign securities. There are no limitations on the countries in which the Funds may invest and the Funds may at times have significant foreign exposure.

3. What is a "special situation"?

Each Fund may invest in special situations. A special situation arises when a portfolio manager believes that the securities of an issuer will be recognized and appreciate in value due to a spe-

cific development with respect to that issuer. Special situations may include significant changes in a company's allocation of its existing capital, a restructuring of assets, or a redirection of free cash flows. For example, issuers undergoing significant capital changes may include companies involved in spin-offs, sales of divisions, mergers or acquisitions, companies emerging from bankruptcy, or companies initiating large changes in their debt to equity ratio. Companies that are redirecting cash flows may be reducing debt, repurchasing shares or paying dividends. Special situations may also result from (i) significant changes in industry structure through regulatory developments or shifts in competition; (ii) a new or improved product, service, operation or technological advance; (iii) changes in senior management; or (iv) significant changes in cost structure.

4. What does "market capitalization" mean?

Market capitalization is the most commonly used measure of the size and value of a company. It is computed by multiplying the current market price of a share of the company's stock by the total number of its shares outstanding. As noted previously, market capitalization is an important investment criteria for Janus Enterprise Fund. Although the other Equity Funds offered by this Prospectus do not emphasize companies of any particular size, Funds with a larger asset base (e.g., Janus Fund, Janus Worldwide Fund and Janus Risk-Managed Stock Fund) are more likely to invest in larger, more established issuers.

5. What does "life science orientation" mean in relation to Janus Global Life Sciences Fund?'

Generally speaking, the "life sciences" relate to maintaining or improving quality of life. So, for example, companies with a "life science orientation" include companies engaged in research, development, production or distribution of products of services related to health and personal care, medicine or pharmaceuticals. Life science oriented companies also include companies that the portfolio manager believes have growth potential primarily as a result of particular products, technology, patents or other market advantages in the life sciences. Life sciences encompass a variety of industries, including health care, nutrition, agriculture, medical diagnostics, nuclear and biochemical research and development and health care facilities ownership and operation.

6. How does Janus Global Value Fund's portfolio manager determine that a company may be undervalued?

A company may be undervalued when, in the opinion of the Fund's portfolio manager, the company is selling for a price that is below its intrinsic worth. A company may be undervalued due to market or economic conditions, temporary earnings declines, unfavorable developments affecting the company or other factors. Such factors may provide buying opportunities at attractive prices compared to historical or market price-earnings ratios, price/free cash flow, book value, or return on equity. The portfolio manager believes that buying these securities at a price that is below theirs intrinsic worth may generate greater returns for the Fund than those

obtained by paying premium prices for companies currently in favor in the market.

7. What is Janus Global Technology Fund's industry policy?

Janus Global Technology Fund will not concentrate its investments in any particular industry or group of related industries. As a result, its portfolio manager may have more flexibility to find companies that he believes will benefit from advances or improvements in technology in a number of industries. Nevertheless, the Fund may hold a significant portion of its assets in industries such as: aerospace/defense; biotechnology; computers; office/business equipment; semiconductors; software; telecommunications; and telecommunications equipment.

8. How do Janus Balanced Fund and Janus Growth and Income Fund differ from each other?

Janus Balanced Fund places a greater emphasis on the income component of its portfolio and invests to a greater degree in securities selected primarily for their income potential. As a result it is expected to be less volatile than Janus Growth and Income Fund. Janus Growth and Income Fund places a greater emphasis on growth stocks and may derive a greater portion of its income from dividend-paying common stocks. Because of these factors, its NAV can be expected to fluctuate more than Janus Balanced Fund.

9. How are assets allocated between the growth and income components of Janus Balanced

Fund's and Janus Growth and Income Fund's portfolios?

Janus Balanced Fund and Janus Growth and Income Fund shift assets between the growth and income components of their portfolios based on the portfolio managers' analysis of relevant market, financial and economic conditions. If a portfolio manager believes that growth securities will provide better returns than the yields then available or expected on income-producing securities, that Fund will place a greater emphasis on the growth component.

10. What types of securities make up the growth component of Janus Balanced Fund's and Janus Growth and Income Fund's portfolios?

The growth component of these Funds' portfolios is expected to consist primarily of common stocks, but may also include preferred stocks or convertible securities selected primarily for their growth potential.

11. What types of securities make up the income component of Janus Balanced Fund's and Janus Growth and Income Fund's portfolios?

The income component of Janus Balanced Fund's and Janus Growth and Income Fund's portfolios will consist of securities that a portfolio manager believes have income potential. Such securities may include equity securities, convertible securities and all types of debt securities. Equity securities may be included in the income component of a Fund if they currently pay dividends or a portfolio manager believes they have the potential for either increasing their dividends or commencing dividends, if none are currently paid.

12. How do interest rates affect the value of my Janus Balanced Fund or Janus Growth and Income Fund investment?

The income component of Janus Balanced Fund's and Janus Growth and Income Fund's portfolios includes fixed-income securities. Generally, a fixed-income security will increase in value when interest rates fall and decrease in value when interest rates rise. Longer-term securities are generally more sensitive to interest rate changes than shorter term securities, but they generally offer compensate yields to compensate investors for the associated risks. High-yield bond prices are generally less directly responsive to interest rate changes than investment grade issues and may not always follow this pattern.

GENERAL PORTFOLIO POLICIES

Unless otherwise stated, each of the following policies applies to all of the Funds. Except for the Funds' policies with respect to investments in illiquid securities and borrowing, the percentage limitations included in these policies and elsewhere in this Prospectus apply at the time of purchase of a security. So, for example, if a Fund exceeds a limit as a result of market fluctuations or the sale of other securities, it will not be required to dispose of any securities.

Cash Position

Except as described below for Janus Risk-Managed Stock Fund, when a Fund's portfolio manager believes that market conditions are unfavorable for profitable investing, or when he or she is otherwise unable to locate attractive investment opportunities, the Funds' cash or simi-

lar investments may increase. In other words, the Funds do not always stay fully invested in stocks and bonds. Cash or similar investments, generally are a residual – they represent the assets that remain after a portfolio manager has committed available assets to desirable investment opportunities. However, a portfolio manager may also temporarily increase a Fund's cash position to, for example, protect its assets, maintain liquidity or meet unusually large redemptions. A Fund's cash position may also increase temporarily due to unusually large cash inflows. Partly because the portfolio managers act independently of each other, the cash positions of the Funds may vary significantly. When a Fund's investments in cash or similar investments increase, it may not participate in market advances or declines to the same extent that it would if the Fund remained more fully invested in stocks or bonds.

Janus Risk-Managed Stock Fund normally remains as fully invested as possible and does not seek to lessen the effects of a declining market through hedging or temporary defensive positions. Janus Risk-Managed Stock Fund may use exchange traded funds as well as futures options, and other derivatives to gain exposure to the stock market pending investment of cash balances or to meet liquidity needs.

Other Types of Investments

The Funds invest primarily in domestic and foreign equity securities, which may include preferred stocks, common stocks, and securities convertible into common or preferred stocks. Janus Growth and Income Fund and Janus Balanced

Fund also invest in domestic and foreign equity securities with varying degrees of emphasis on income. To a lesser degree, the Funds may invest in other types of domestic and foreign securities and use other investment strategies, which are described in the Glossary. These may include:

- debt securities
- indexed/structured securities
- high-yield/high-risk bonds (less than 20% of Janus Core Equity fund's, Janus Special Equity Fund's and Janus Risk-Managed Stock Fund's assets and less than 35% of each other Fund's assets)
- options, futures, forwards, swaps and other types of derivatives and exchange traded funds individually or in combination for hedging purposes (including to gain exposure to the stock market pending investment of cash balances or to meet liquidity needs) or for non-hedging purposes such as seeking to enhance return
- short sales (no more than 8% of a Fund's assets may be invested in "naked" short sales)
- securities purchased on a when-issued, delayed delivery or forward commitment basis

Illiquid Investments

Each Fund may invest up to 15% of its net assets in illiquid investments. An illiquid investment is a security or other position that cannot be disposed of quickly in the normal course of business. For example, some securities are not registered under U.S. securities laws and cannot be sold to

the U.S. public because of SEC regulations (these are known as "restricted securities"). Under procedures adopted by the Funds' Trustees, certain restricted securities may be deemed liquid, and will not be counted toward this 15% limit.

Foreign Securities

Within the parameters of its specific investment policies, each Fund may invest without, limit in foreign equity and debt securities. The Funds may invest directly in foreign securities denominated in a foreign currency and not publicly traded in the United States. Other ways of investing in foreign securities, include depositary receipts or shares and passive foreign investment companies.

Special Situations

Certain Funds may invest in special situations. A special situation arises when, in the opinion of a Fund's portfolio manager, the securities of a particular issuer will be recognized and appreciate in value due to a specific development with respect to that issuer. Special situations may include significant changes in a company's allocation of its existing capital, a restructuring of assets or a redirection of free cash flow. Developments creating a special situation might include, among others, a new product or process, a technological breakthrough, a management change or other extraordinary corporate event, or differences in market supply of and demand for the security. A Fund's performance could suffer if the anticipated development in a "special situation" investment does not occur or does not attract the expected attention.

Portfolio Turnover

The Funds generally intend to purchase securities for long-term investment, although, to a limited extent, a Fund may purchase securities in anticipation of relatively short-term price gains. Short-term transactions may also result from liquidity needs, securities having reached a price or yield objective, changes in interest rates or the treat, standing of an issuer, or by reason of economic or other developments not foreseen at the time of the investment decision. A Fund may also sell one security and simultaneously purchase the same or a comparable security to take advantage of short-term differentials in bond yields or securities prices. Portfolio turnover is affected by market conditions, changes in the size of a Fund, the nature of the Fund's investments and the investment style of the portfolio manager. Changes are made in a Fund's portfolio whenever its portfolio manager believes such changes are desirable. Portfolio turnover rates are generally not a factor in making buy and sell decisions.

The rebalancing technique used by Janus Risk-Managed Stock Fund may result in a higher portfolio turnover compared to a "'buy and hold" or index fund strategy. INTECH periodically rebalances the stocks in the portfolio to their optimal weighting versus the Fund's benchmark index, as determined by INTECH's mathematical process.

Increased portfolio turnover may result in higher costs for brokerage commissions, dealer mark-ups and other transaction costs associated with increased portfolio turnover may offset gains in a

Fund's performance. The Financial Highlights section of this Prospectus shows the Funds' historical turnover rates.

RISKS

Because the Funds may invest substantially all of their assets in common stocks, the main risk is the risk that the value of the stocks they hold might decrease in response to the activities of an individual company or in response to general market and/or economic conditions. If this occurs, a Fund's share price may also decrease. A Fund's performance may also be affected by risks specific to certain types of investments, such as foreign securities, derivative investments, non-investment grade bonds, initial public offerings (IPOs) or companies with relatively small market capitalizations. IPOs and other investment techniques may have a magnified performance impact on a Fund with a small asset base. A Fund may not experience similar performance as its assets grow. Janus Global Life Sciences Fund's and Janus Global Technology Fund's performance may also be affected by industry risk to a greater extent than the other Funds.

The following questions and answers are designed to help you better understand some of the risks of investing in the Funds.

1. ***How does the nondiversification classification of Janus Enterprise Fund, Janus Olympus Fund, Janus Orion Fund, Janus Global Technology Fund, Janus Global Value Fund and Janus Special Equity Fund, affect the Funds' risk profile?***

   Diversification is a way to reduce risk by investing in a broad range of stocks or other securities. A fund that is classified as "nondiversified" has the ability to take larger positions in a smaller number of issuers than a fund that is classified as "diversified." This gives a Fund more flexibility to focus its investments in the most attractive companies identified by the Fund's portfolio manager. Because the appreciation or depreciation of a single stock may have a greater impact on the NAV of a nondiversified fund, its share price can, be expected to fluctuate more than a comparable diversified fund. This fluctuation, if significant, may affect the performance of a Fund. Since Janus Orion Fund normally concentrates in a core portfolio of 20-30 common stocks, this risk may be increased.

2. ***What is "industry risk"?***

   Industry risk is the possibility that a group of related stocks will decline in price due to industry-specific developments. Companies in the same or similar industries may share common characteristics and are more likely to react similarly to industry-specific market or economic developments. Each Fund may at times have significant exposure to industry risk as a result of investing in multiple companies in a particular industry. In the life sciences, for example, many companies are subject to government regulation and ap-

proval of their products and services, which may affect their price or availability. In addition, the products and services offered by these companies may quickly become obsolete in the face of scientific or, technological developments. The economic outlook of such companies may fluctuate dramatically due to changes in regulatory or competitive environments. Similarly, in technology-related industries, competitive pressures may have a significant effect on the performance of companies in which a Fund may invest. In addition, technology and technology-related companies often progress at an accelerated rate, and these companies may be subject to short product cycles and aggressive pricing, which may increase their volatility.

Janus Global Life Sciences Fund invests in a concentrated portfolio, which may result in greater exposure to related industries. As a result, this Fund may be more volatile than a less concentrated portfolio. Although the other Funds offered by this Prospectus do not "concentrate" in a specific group of industries, each may a times have significant exposure to industry risk as a result of investing in multiple companies in a particular industry.

3. ***What are the risks associated with value investing?***

If the portfolio manager's perception of a company's worth is not realized in the time frame he, expects, the overall performance of Janus Global Value Fund may suffer. In general, the portfolio manager believes this risk is mitigated by investing in companies that are undervalued in the

market in relation to earnings, dividends and/or assets.

4. ***How could the Funds' investments in foreign securities affect their performance?***

Within the parameters of its specific investment policies, each Fund may invest without limit in foreign securities either indirectly (e.g., depositary receipts) or directly in foreign markets. Investments in foreign securities, including those of foreign governments, may involve greater risks than investing in domestic securities because a Fund's performance may depend on factors other than the performance of a particular company. These factors include:

- ***Currency Risk.*** As long as a Fund holds a foreign security, its value will be affected by the value of the local currency relative to the U.S. dollar. When a Fund sells a foreign denominated security, its value may be worth less in U.S. dollars even if the security increases in value in its home country. U.S. dollar denominated securities of foreign issuers may also be affected by currency risk.
- ***Political and Economic Risk.*** Foreign investments may be subject to heightened political and economic risks, particularly in emerging markets which may have relatively unstable governments, immature economic structures, national policies restricting investments by foreigners, different legal systems, and economies based on only a few industries. In some countries, there is the risk that the government may take over the assets or operations of a company or that the government may impose taxes or limits on

the removal of a Fund's assets from that country.

- ***Regulatory Risk.*** There may be less government supervision of foreign markets. As a result, foreign issuers may not be subject to the uniform accounting, auditing and financial reporting standards and practices applicable to domestic issuers and there may be less publicly available information about foreign issuers.
- ***Market Risk.*** Foreign securities markets, particularly those of emerging market countries, may be less liquid and more volatile than domestic markets. Certain markets may require payment for securities before delivery and delays may be encountered in settling securities transactions. In some foreign markets, there may not be protection against failure by other parties to complete transactions.
- ***Transaction Costs.*** Costs of buying, selling and holding foreign securities, including brokerage, tax and custody costs, may be higher than those involved in domestic transactions.

5. ***Are there special risks associated with investments in high-yield/high-risk bonds?***

High-yield/high-risk bonds (or "junk" bonds) are bonds rated below investment grade by the primary rating agencies such as Standard & Poor's and Moody's. The value of lower quality bonds generally is more dependent on credit risk, or the ability of the issuer to meet interest and principal payments, than investment grade bonds. Issuers of high-yield bonds may not be as strong

financially as those issuing bonds with higher credit ratings and are more vulnerable to real or perceived economic changes, political changes or adverse developments specific to the issuer.

Please refer to the SAI for a description of bond rating categories.

6. ***How do the Funds try to reduce risk?***

Except as described below for Janus Risk-Managed Stock Fund, the Funds may use futures, options, swaps and other derivative instruments to "hedge" or protect their portfolios from adverse movements in securities prices and interest rates. The Funds may also use a variety of currency hedging techniques, including forward currency contracts, to manage exchange rate risk. The portfolio managers believe the use of these instruments will benefit the Funds. However, a Fund's performance could be worse than if the Fund had not used such instruments if a portfolio manager's judgment proves incorrect.

Janus Risk-Managed Stock Fund's subadviser, INTECH, approaches risk management from a perspective that evaluates risk relative to a direct investment in the benchmark index. Risk controls are designed to minimize the risk of significant under performance relative to the benchmark index.

Janus Risk-Managed Stock Fund normally remains as fully invested as possible and does not seek to lessen the effects of a declining market through hedging or temporary defensive positions. However, they may use futures and options and may invest in exchange traded funds to

gain exposure to the stock market pending investment of cash balances or to meet liquidity needs. Janus Risk-Managed Fund may use futures, options, swaps and other derivative instruments to "hedge" or protect its portfolio from adverse movements in securities prices and interest rates. The Fund may also use a variety of currency hedging techniques, including forward currency contracts, to manage exchange rate risk. The portfolio managers believe the use of these instruments will benefit the Fund. However, the Fund's performance could be worse than if the Fund had not used such instruments if the portfolio managers' judgment proves incorrect.

7. ***The Funds may invest in smaller or newer companies. Does this create any special risks?***

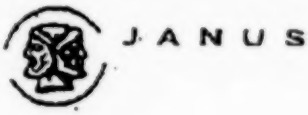
Many attractive investment opportunities may be smaller, start-up companies offering emerging products or services. Smaller or newer companies may suffer more significant losses as well as realize more substantial growth than larger or more established issuers because they may lack depth of management, be unable to generate funds necessary for growth or potential development or be developing or marketing new products or services for which markets are not yet established and may never become established. In, addition, such companies may be insignificant factors in their industries and may become subject to intense competition from larger or more established companies. Securities of smaller or newer companies may have more limited trading markets than the markets for securities of larger

or more established issuers, or may not be publicly traded at all, and may be subject to wide price fluctuations. Investments in such companies tend to be more volatile and somewhat more speculative.

Janus Equity Funds

Shareholder's Guide

This section will help you become familiar with the different types of accounts you can establish with the Funds. It also explains how to purchase, exchange and redeem shares, as well as account policies and fees that may apply to your account. Account policies (including fees), services and features may be modified or discontinued without shareholder approval or prior notice.



CERTAIN FUNDS MAY NOT BE AVAILABLE THROUGH YOUR FINANCIAL INTERMEDIARY OR PLAN SPONSOR. **CONTACT YOUR FINANCIAL INTERMEDIARY OR PLAN SPONSOR, OR REFER TO YOUR PLAN DOCUMENTS FOR INSTRUCTIONS ON HOW TO PURCHASE, REDEEM OR EXCHANGE SHARES.**

With certain limited exceptions, the Funds are available only to U.S. Citizens or residents.

PRICING OF FUND SHARES

All purchases, sales and exchanges will be processed at the NAV next calculated after your request is received and accepted by a Fund (or a Fund's agent), minus any applicable redemption fee for transactions in Janus Global Life Sciences Fund, Janus Global Technology Fund, Janus Global Value Fund, Janus Worldwide Fund and Janus Risk-Managed Stock Fund. A Fund's NAV is calculated at the close of the regular trading session of the NYSE (normally 4:00 p.m. New York time) each day that the NYSE is open. In order to receive a day's price, your financial intermediary or plan sponsor must receive your order by the close of the regular trading session of the NYSE. Securities are valued at market value or, if a market quotation is not readily available, or if events or circumstances that may affect the value of portfolio securities are identified between the closing of their principal markets and the time the NAV is determined, at their fair value determined in good faith under procedures established by and under the supervision of the Trustees. Short-term instruments maturing

within 60 days are valued at amortized cost, which approximates market value.

Because foreign securities markets may operate on days that are not business days in the United States, the value of the Funds' holdings may change on days when you will not be able to purchase or redeem the Funds' shares.

If you hold a Fund account through a financial intermediary or plan sponsor, all purchases, exchanges, redemptions or other account activity must be processed through your financial intermediary or plan sponsor. Your financial intermediary or plan sponsor is responsible for promptly transmitting purchase, redemption and other requests to the Funds under the arrangements made between your financial intermediary or plan sponsor and its customers. The Funds are not responsible for the failure of any financial intermediary or plan sponsor to carry out its obligations to its customers.

PURCHASES

Contact your financial intermediary or plan sponsor, or refer to your plan documents for information on how to invest in each Fund, including any minimum initial or subsequent investment requirements.

Each Fund may refuse specific purchase order, including exchange purchases, for any reason. For example, purchase orders may be refused if a Fund would be unable to invest the money effectively in accordance with its investment policies or would otherwise be adversely affected due to the size of the transaction, frequency of trading or other factors.

EXCHANGES

Contact your financial intermediary or plan sponsor, or consult your plan documents to exchange into other Funds in Janus Investment Fund. Be sure to read the prospectus of the Fund into which you are exchanging. An exchange is a taxable transaction (except for qualified plan accounts).

- You may exchange shares of a Fund for shares of another Fund in Janus Investment Fund only if that Fund is offered through your financial intermediary or plan sponsor.
- You must meet the minimum investment amount for each Fund.
- An exchange from Janus Global Life Sciences Fund, Janus Global Technology Fund, Janus Global Value Fund, Janus Worldwide Fund or Janus Risk-Managed Stock Fund, may be subject to the Funds 1.00% redemption fee. Certain intermediaries have agreed to charge the Fund's redemption fee on their customers' accounts. In this case, the amount of the fee and the holding period will generally be consistent with the Funds'. However, the intermediaries' methods for tracking and calculating the fee may differ in some respects from the Funds. This fee is paid to the Funds rather than Janus Capital, and is designed to offset the brokerage commissions, market impact, and other costs associated with changes in the Funds' asset level and cash flow due to short-term trading. The redemption fee does not apply to any shares purchased through: (1) certain employer-sponsored retirement plans; (2) certain bro-

ker wrap fee and other fee-based programs; (3) accounts where employees of Janus Capital or any of its subsidiaries are listed in the account registration; and (4) reinvested distributions (dividends and capital gains). Janus Capital reserves the right to waive the redemption fee in other circumstances at its discretion.

- If you are exchanging into a closed Fund, you may be required to demonstrate eligibility to purchase shares of that Fund.
- The exchange privilege is not intended as a vehicle for short-term or excessive trading. The Funds do not permit frequent trading or market timing. Excessive exchanges of Fund shares disrupt portfolio management and drive Fund expenses higher. Your financial intermediary or plan sponsor may suspend or terminate your exchange privilege if you engage in an excessive pattern of exchanges.

REDEMPTIONS

Please contact your intermediary or plan sponsor, or refer to the appropriate plan documents for details including any restrictions, redemption charges, redemption in kind, automatic redemption and delays in honoring redemption requests.

As discussed under "Exchanges," your intermediary may deduct a redemption fee of 1.00% from your redemption proceeds. Your shares will be sold at the NAV next calculated after your order is received in proper form, minus the redemption fee, if applicable.

Shares of the Funds may be redeemed on any business day. Redemptions are processed at the

NAV next calculated after receipt and acceptance of the redemption order by the Fund or its agent. Redemption proceeds will normally be wired to your financial intermediary or plan sponsor the business day following receipt of the redemption order, but in no event later than seven days after receipt of such order.

TAX-DEFERRED ACCOUNTS

If you are eligible and your financial intermediary or plan sponsor provides this option, you may set up one or more tax-deferred accounts. A tax-deferred account allows you to shelter your investment income and capital gains from current income taxes. A contribution to certain of these plans may also be tax deductible. Investors should consult their tax adviser or legal counsel before selecting a tax-deferred account.

EXCESSIVE TRADING POLICY

Frequent trades into or out of a Fund can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders, including long-term shareholders who do not generate these costs. The Funds are not intended for market timing or excessive trading. The Funds and their agents may reject any purchase request (including exchange purchases if permitted by your financial intermediary or plan sponsor) by any investor or group of investors indefinitely if they believe that any combination of trading activity is attributable to market timing or is otherwise excessive or potentially disruptive to the Fund. The Funds may refuse purchase orders (including exchange purchases) for any reason without prior notice, particularly orders that the Funds believe are made on behalf of market timers.

The trading history of accounts under common ownership or control may be considered in enforcing these policies. Transactions placed through the same financial intermediary or plan sponsor on an omnibus basis may be deemed part of a group for the purpose of this policy and may be rejected in whole or in part by a Fund. Transactions accepted by your financial intermediary or plan sponsor in violation of our excessive trading policy are not deemed accepted by the Funds and may be cancelled or revoked by the Funds on the next business day following receipt by your financial intermediary or plan sponsor.

SHAREHOLDER ACCOUNT POLICIES

Transactions Through Financial Intermediaries

Fund shares purchased or sold through a financial intermediary or plan sponsor may be subject to a fee and may require different minimum initial and subsequent investments than Fund shares purchased directly from Janus. Financial intermediaries or plan sponsors may also impose other charges or restrictions different from those applicable to shareholders who invest in the Funds directly. For Janus Global Life Sciences Fund, Janus Global Technology Fund, Janus Global Value Fund, Janus Worldwide Fund and Janus Risk-Managed Stock Fund, certain financial intermediaries and plan sponsors have agreed to charge the Fund's 1.00% redemption fee on their customers' accounts. In this case, the amount of the fee and the holding period will generally be consistent with the Fund's. However, the financial intermediaries' or plan spon-

sors' methods for tracking and calculating the fee may differ in some respects from the Funds.

A financial intermediary or plan sponsor, rather than its customers, may be the shareholder of record of your shares. The Funds are not responsible for the failure of any financial intermediary or plan sponsor to carry out its obligations to its customers. Certain financial intermediaries and plan sponsors may receive compensation from Janus Capital or its Affiliates, and certain financial intermediaries and plan sponsors may receive compensation from the Funds for shareholder recordkeeping and similar services.

Statements and Reports

Your financial intermediary or plan sponsor will send you periodic statements of all transactions, as required by applicable law. The Funds distribute dividend information annually.

You will receive annual and semiannual reports including the financial statements of the Funds that you have authorized for investment through your financial intermediary or plan sponsor. These reports show each Fund's investments and, the market value of such investments, as well as other information about each Fund and its operations. The Trust's fiscal year ends October 31.

MANAGEMENT OF THE FUNDS

INVESTMENT ADVISER

Janus Capital, 100 Fillmore Street, Denver, Colorado 80206-4928, is the investment adviser to each of the Funds. Janus Capital is responsi-

ble for the day-to-day management of the investment portfolios of all Funds except Janus Risk-Managed Stock Fund and other business affairs of the Funds.

Janus Capital (together with its predecessors) has served as investment adviser to Janus Fund since 1970 and currently serves as investment adviser to all of the Janus funds, acts as subadviser for a number of private-label mutual funds and provides separate account advisory services for institutional accounts.

Janus Capital furnishes continuous advice and recommendations concerning the Funds' investments. Janus Capital also furnishes certain administrative, compliance and accounting services for the Funds, and may be reimbursed by the Funds for its costs providing those services. In addition, Janus Capital employees serve as officers of the Trust and Janus Capital provides office space for the Funds and pays the salaries, fees and expenses of all Fund officers and those Trustees who are interested persons of Janus Capital.

MANAGEMENT EXPENSES

Each Fund pays Janus Capital a management fee which is calculated daily and paid monthly. Each Fund's advisory agreement spells out the management fee and other expenses that the Fund must pay. Janus Capital pays INTECH a Subadvisory fee from its management fee for managing Janus Risk-Managed Stock Fund. For the most recent fiscal year, each Fund paid Janus Capital a management fee of 0.65% of its average daily net assets for the period it was in operation.

Each Fund incurs expenses not assumed by Janus Capital, including transfer agent and custodian fees and expenses, legal and auditing fees, printing and mailing costs of sending reports and other information to existing shareholders, and independent Trustees' fees and expenses.

SUBADVISER

Enhanced Investment Technologies, LLC ("INTECH") serves as subadviser to Janus Risk-Managed Stock Fund. INTECH, 2401 PGA Boulevard, Suite 200, Palm Beach Gardens, Florida 33410, also serves as investment adviser to separately managed accounts and other registered investment companies. As subadviser, INTECH provides day-to-day management of the investment operations of the Fund. As of January 1, 2003, Janus Capital indirectly owned 50.1% of the outstanding voting shares of INTECH.

INVESTMENT PERSONNEL
JANUS PORTFOLIO MANAGERS

Laurence J. Chang

is Executive Vice President and Co-Manager of Janus Worldwide Fund, for which he has served as Co-Manager since September 1999. Mr. Chang served as Executive Vice President and Co-Manager of Janus Overseas Fund from April 1998 through December 2000. Mr. Chang is also Portfolio Manager of other Janus accounts. He joined Janus Capital in 1993 as a research analyst. Mr. Chang received an undergraduate degree with honors in Religion with a concentration in Philosophy from Dartmouth College and a Master's degree in Political Science from Stanford University. Mr. Chang has earned the right to use the Chartered Financial Analyst designation.

Jonathan D. Coleman

is Executive Vice President and Portfolio Manager of Janus Enterprise Fund. He is also Portfolio Manager of other Janus accounts. Mr. Coleman served as Co-Portfolio Manager for Janus Venture Fund

from 1997 through 2000. He joined Janus Capital in 1994 as a research analyst, and was also a research analyst for Janus Capital from 2000 through 2002. Mr. Coleman holds a bachelor's degree in political economy and Spanish from Williams College, where he was a member of Phi Beta Kappa. As a Fulbright Fellow, he conducted research on economic integration in Central America. Mr. Coleman earned the right to use the Chartered Financial Analyst designation.

David J. Corkins

is Executive Vice President and Portfolio Manager of Janus Growth and Income Fund, which he has managed since August 1997, and Janus Mercury Fund, which he has managed since February 2003. Mr. Corkins is also Portfolio Manager of other Janus accounts. He joined Janus Capital in 1995 as a research analyst. Mr. Corkins holds a Bachelor of Arts degree in English and Russian from Dartmouth and he received his Master's degree in Business Administration from Columbia University in 1993.

David C. Decker

is Executive Vice President and Portfolio Manager of Janus Special Equity Fund (formerly Janus Strategic Value Fund), which he has managed since inception. Mr. Decker served as Portfolio Manager of Janus Special Situations Fund from its inception until it merged into Janus Strategic Value Fund in February 2003. He joined Janus Capital in 1992 as a research analyst. Mr. Decker holds a Master's of Business Administration degree with an emphasis in Finance from the Fuqua School of Business at Duke University and a Bachelor of Arts degree in Economics and Political Science from Tufts University. Mr. Decker has earned the right to use the Chartered Financial Analysis designation.

Helen Young Hayes

is Executive Vice President and Co-Manager of Janus Worldwide Fund and Janus Overseas Fund. She joined Janus Capital in 1987 and has served as Portfolio Manager or a Co-Manager of Janus Worldwide Fund and Janus Overseas Fund since their inception. Ms. Hayes is

also Portfolio Manager of other Janus accounts. Ms. Hayes is the Managing Director of Investments of Janus Capital and a Director of Janus Capital Group Inc. She holds a Bachelor of Arts degree in Economics from Yale University. Ms. Hayes has earned the right to use the Chartered Financial Analyst designation.

C. Mike Lu

is Executive Vice President and Portfolio Manager of Janus Global Technology Fund, which he has managed since inception. Mr. Lu is also Portfolio Manager of other Janus accounts. Mr. Lu holds a Bachelor of Arts degree in History and a Bachelor of Arts degree in Economics from Yale University. Mr. Lu has earned the right to use the Chartered Financial Analyst designation.

Thomas R. Malley

is Executive Vice President and Portfolio Manager of Janus Global Life Sciences Fund, which he has managed since inception. Mr. Malley is also Portfolio Manager of other Janus accounts. He joined

Janus Capital in 1991 as a research analyst. Mr. Malley holds a Bachelor of Science degree in biology from Stanford University. Mr. Malley has earned the right to use the Chartered Financial Analyst designation.

Karen L. Reidy

is Executive Vice President and Portfolio Manager of Janus Balanced Fund and Janus Core Equity Fund. She is also Portfolio Manager of other Janus accounts. Ms. Reidy joined Janus Capital in 1995 as a research analyst. Ms. Reidy holds an undergraduate degree in Accounting from the University of Colorado. Ms. Reidy has earned the right to use the Chartered Financial Analyst designation.

Blaine P. Rollins

is Executive Vice President and Portfolio Manager of Janus Fund, which he has managed since January 2000. Mr. Rollins served as Executive Vice President and Portfolio Manager of Janus Balanced Fund from January 1996 through December 1999, and as Executive Vice President and Portfolio Manager of Janus Equity Income Fund from

June 1996 through December 1999. Mr. Rollins is also Portfolio Manager of other Janus accounts. He holds a Bachelor of Science degree in Finance from the University of Colorado. Mr. Rollins has earned the right to use the Chartered Financial Analyst designation.

Ron Sachs

is Executive Vice President and Portfolio Manger of Janus Orion Fund, which he has managed since inception. He is also Portfolio Manager of other Janus accounts. Mr. Sachs joined Janus Capital in 1996 as a research analyst. Mr. Sachs holds an undergraduate degree (cum laude) in Economics from Princeton and a law degree from the University of Michigan. Mr. Sachs has earned the right to use the Chartered Financial Analyst designation.

Jason P. Yee

is Executive Vice President and Portfolio Manager of Janus Global Fund, which he has managed since inception. Mr. Yee is also Portfolio Manager of other Janus accounts. He joined Janus in July 1992, work-

ing as a research analyst until April 1996. From April 1996 to April 2000, Mr. Yee was a portfolio manager and managing director at Bee & Associates. He re-joined Janus in April 2000. He holds a Bachelor of Science in Mechanical Engineering from Stanford University. Mr. Yee has earned the right to use the Chartered Financial Analyst designation.

Claire Young

is Executive Vice President and Portfolio Manager of Janus Olympus Fund, which she has managed since August 1997. She is also Portfolio Manager of other Janus accounts. Ms. Young joined Janus Capital in January 1992. Ms. Young holds a Bachelor of Science degree in Electrical Engineering from Yale University. Ms. Young has earned the right to use the Chartered Financial Analyst designation.

JANUS ASSISTANT PORTFOLIO MANAGER

Minyoung Sohn

is Assistant Portfolio Manager of Janus Mercury Fund and Janus Growth and Income Fund. He joined Janus Capital in 1998 as a research analyst. Mr. Sohn holds a Bachelor's degree in Government and Economics from Dartmouth College. Mr. Sohn has earned the right to use the Chartered Financial Analyst designation.

INTECH PORTFOLIO MANAGERS

No one person on the investment team is primarily responsible for implementing the investment strategies of Janus Risk-Managed Stock Fund. The team of investment professionals at INTECH works together to implement the mathematical portfolio management process. E. Robert Fernholz joined INTECH in June of 1987, and was formerly Director of Research at Metropolitan Securities. He received his A.B. in Mathematics from Princeton University and his Ph.D. in Mathematics from Columbia University. He has held various academic positions in Mathematics and Statistics at Princeton University, City University of New York, Universidad de Buenos Aires and University of Washington. Dr. Fernholz published a paper in the May 1982 Journal of Finance that became the basis for INTECH's portfolio process. He has 21 years of investment experience.

OTHER INFORMATION

Size of Funds

The Funds may discontinue sales of their shares if management and the Trustees believe that continued sales may adversely affect a Fund's ability to achieve its investment objective. If sales of a Fund are discontinued, it is expected that existing plan participants and other shareholders invested in that Fund would be permitted to continue to purchase shares and to reinvest any dividends or capital gains distributions, absent highly unusual circumstances.

Distribution of the Funds

The Funds are distributed by Janus Distributions LLC, which is a member of the National Association of Securities Dealers, Inc. ("NASD"). To obtain information about NASD member firms and their associated persons, you may contact NASD Regulation, Inc. at www.nasdr.com, or the Public Disclosure Hotline at 800-289-9999. An investor brochure containing information describing the Public Disclosure Program is available from NASD Regulation, Inc.

DISTRIBUTIONS AND TAXES

DISTRIBUTIONS

To avoid taxation of the Funds, the Internal Revenue Code requires each Fund to distribute net income and any net capital gains realized on its investments annually. A Fund's income from dividends and interest and any net realized short-term gains are paid to shareholders as ordinary income dividends. Net realized long-term

gains are paid to shareholders as capital gains distributions.

Distribution Schedule

	Dividends	*Capital Gains*
Janus Balanced Fund and Janus Growth and Income Fund	Normally declared and distributed in March, June, September and December	Normally declared and distributed in December
All other Equity Funds	Normally declared and distributed in December	Normally declared and distributed in December

How Distributions Affect a Fund's NAV

Distributions are paid to shareholders as of the record date of a distribution of a Fund, regardless of how long the shares have been held. Dividends and capital gains awaiting distribution are included in each Fund's daily NAV. The share price of a Fund drops by the amount of the distribution, net of any subsequent market fluctuations. As an example, assume that on December 31, a Fund declared a dividend in the amount of $0.25 per share. If a Fund's share price was $10.00 on December 30, the Fund's share price on December 31 would be $9.75, barring market fluctuations. Shareholders should be aware that distributions from a taxable mutual fund are not value-enhancing and may create income tax obligations.

"Buying a Dividend"

If you purchase shares of a Fund just before the distribution, you will pay the full price for the

shares and receive a portion of the purchase price back as a taxable distribution. This is referred to as "buying a dividend." In the above example, if you bought shares on December 30, you would have paid $10.00 per share. On December 31, the Fund would pay you $0.25 per share as a dividend and your shares would now be worth $9.75 per share. Unless your account is set up as a tax-deferred account, dividends paid to you would be included in your gross income for tax purposes, even though you may not have participated in the increase in NAV of the Fund, whether or not you reinvested the dividends.

TAXES

As with any investment, you should consider the tax consequences of investing in the Funds. Any time you sell or exchange shares of a fund, in a taxable account, it is considered a taxable event. Depending on the purchase price and the sale price, you may have a gain of loss on the transaction. Any tax liabilities generated by your transactions are your responsibility.

The following discussion does not apply to tax-deferred accounts, nor is it a complete analysis of the federal tax implications of investing in the Funds. You should consult your own tax adviser if you have any questions. Additionally, state or local taxes may apply to your investment, depending upon the laws of your state of residence.

Taxes on Distributions

Dividends and distributions of the Funds are subject to federal income tax, regardless of whether the distribution is made in cash or reinvested in additional shares of a Fund. Distribu-

tions may be taxable at different rates depending on the length of time a Fund holds a security. In certain states, a portion of the dividends and distributions (depending on the sources of a Fund's Income) may be exempt from state and local taxes. Information regarding the tax status of income dividends and capital gains distributions will be mailed to shareholders on or before January 31st of each year. Account tax information will also be sent to the IRS.

Taxation of the Funds

Dividends, interest, and some capital gains received by the Funds on foreign securities may be subject to tax withholding or other foreign taxes. The Funds may from year to year make the election permitted under section 853 of the Internal Revenue Code to pass through such taxes to shareholders as a foreign tax credit. If such an election is not made, any foreign taxes paid or accrued will represent an expense to the Funds.

The Funds do not expect to pay federal income excise taxes because they intend to meet certain requirements of the Internal Revenue Code. It is important that the Funds meet these requirements so that any earnings on your investment will not be taxed twice.

FINANCIAL HIGHLIGHTS

The financial highlights tables are intended to help you understand the Funds' financial performance for the past 5 years through October 31st of each fiscal year shown. (or for Funds with a performance history shorter than 5 years, through October 31st of each fiscal period

shown). Items 1 through "Net asset value, end of period" reflect financial results for a single Fund share. The total returns in the tables represent the rate that an investor would have earned (or lost) on an investment in each of the Funds (assuming reinvestment of all dividends and distributions). No financial highlights are presented for Janus Risk-Managed Stock Fund because it did not commence operations until February 28, 2003. This information has been audited by PricewaterhouseCoopers LLP, whose report, along with the Funds' financial statements, is included in the Annual Report, which is available upon request and incorporated by referenced into the SAI.

Janus Fund

		Years ended October 31				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$22.11**	**$44.00**	**$42.78**	**$27.97**	**$29.36**
	Income from investment operations:					
2.	Net investment income	-	-	-	-	(0.02)
3.	Net gains or (losses) on securities (both realized and unrealized)	(3.72)	(17.50)	6.44	15.63	3.70
4.	Total from investment operations	(3.72)	(17.50)	6.44	15.63	$3.68
	Less distributions:*					
5.	Dividends (from net investment income)	-	-	-	-	(0.23)
6.	Distributions (from capital gains)	-	(4.39)	(5.22)	(0.82)	(4.84)
7.	Total distributions	-	(4.39)	(5.22)	(0.82)	(5.07)
8.	**Net asset value, end of period**	**$18.39**	**$22.41**	**$44.00**	**$42.78**	**$27.97**
9.	Total return	(16.82%)	(43.42%)	15.60%	56.75%	15.12%
10.	Net assets, end of period (in millions)	$16,320	$23,513	$46,468	$35,835	$20,721
11.	Average net assets for the period (in millions)	$21,651	$34,255	$45,103	$28,993	$20,777
12.	Ratio of gross expenses to average net assets	0.85%	0.84%	0.85%	0.85%	0.87%
13.	Ratio of net expenses to average net assets	0.84%	0.83%	0.84%	0.84%	0.86%
14.	Ratio of net	(0.24%)	(0.16%)	(0.19%)	(0.14%)	-

	investment income/(loss) to average net assets					
15.	Portfolio turnover rate	27%	51%	65%	63%	70%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Enterprise Fund

		Years ended October 31st				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$29.67**	**$68.41**	**$58.64**	**$32.33**	**$30.86**
	Income from investment operations:					
2.	Net investment income (loss)	-	-	-	-	-
3.	Net gains or (losses) on securities (both realized and unrealized)	(6.74)	(38.74)	13.10	30.61	3.43
4.	Total from investment operations	(6.74)	(38.74)	13.10	30.61	3.43
	Less distributions:*					
5.	Dividends (from net investment income)	-	-	-	-	-
6.	Distributions (from capital gains)	-	-	(3.33)	(4.30)	(1.96)
7.	Total distributions	-	-	(3.33)	(4.30)	(1.96)
8.	**Net asset value, end of period**	**$22.93**	**$29.67**	**$68.41**	**$58.64**	**$32.33**

9.	Total return	(22.72%)	(56.63%)	22.29%	104.09%	11.79%
10.	Net assets, end of period (in millions)	$1,854	$3,072	$8,085	$2,330	$559
11.	Average net assets for the period (in millions)	$2,518	$4,858	$7,266	$1,127	$551
12.	Ratio of gross expenses to average net assets	0.93%	0.92%	0.90%	0.98%	1.08%
13.	Ratio of net expenses to average net assets	0.90%	0.90%	0.88%	0.95%	1.06%
14.	Ratio of net investment income/(loss) to average net assets	(0.43%)	(0.55%)	(0.65%)	(0.67%)	(0.67%)
15.	Portfolio turnover rate	64%	85%	80%	98%	134%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Mercury Fund

		Years ended October 31st				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$19.14**	**$40.59**	**$35.65**	**$20.77**	**$18.65**
	Income from investment operations:					
2.	Net investment income/loss	-	0.04	0.03	-	(0.01)
3.	Net gains or (losses) on securities (both realized and unrealized)	(4.18)	(17.05)	8.18	16.89	4.07
4.	Total from investment operations	(4.18)	(17.01)	8.21	16.89	4.06
	Less distributions:*					
5.	Dividends (from net investment income)	(0.04)	(0.03)	-	-	(0.04)
6.	Distributions (from capital gains)	-	(4.41)	(3.27)	(2.01)	(1.90)
7.	Total distributions	(0.04)	(4.44)	(3.27)	(2.01)	(1.94)
8.	**Net asset value, end of period**	**$14.92**	**$19.14**	**$40.59**	**$35.65**	**$20.77**
9.	Total return	(21.88%)	(46.21%)	22.99%	86.02%	24.75%
10.	Net assets, end of period (in millions)	$5,034	$7,910	$16,348	$9,060	$2,368
11.	Average net assets for the period (in millions)	$6,784	$11,243	$15,904	$5,258	$2,103
12.	Ratio of gross expenses to average net assets	0.94%	0.89%	0.89%	0.93%	0.97%
13.	Ratio of net expenses to average net assets	0.92%	0.88%	0.88%	0.91%	0.94%
14.	Ratio of net	(0.07%)	0.16%	0.08%	(0.39%)	(0.33%)

	investment income/(loss) to average net assets					
15.	Portfolio turnover rate	97%	83%	71%	89%	105%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Olympus Fund

		Years ended October 31st				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$24.59**	**$50.50**	**$40.87**	**$21.70**	**$18.41**
	Income from investment operations:					
2.	Net investment income (loss)	-	0.13	0.21	0.02	-
3.	Net gains or (losses) on securities (both realized and unrealized)	(3.88)	(25.42)	11.21	19.15	4.05
4.	Total from investment operations	(3.88)	(25.29)	11.42	19.17	4.05
	Less distributions:*					
5.	Dividends (from net investment income)	(0.11)	(0.23)	(0.01)	-	(0.04)
6.	Distributions (from capital gains)	-	(0.39)	(1.78)	-	(0.72)
7.	Total distributions	(0.11)	(0.62)	(1.79)	-	(0.76)
8.	**Net asset value, end of period**	**$20.60**	**$24.59**	**$50.50**	**$40.87**	**$21.70**
9.	Total return	(15.89%)	(50.61%)	28.05%	88.34%	23.10%
10.	Net assets, end	$2,136	$3,074	$7,696	$3,887	$947

	of period (in millions)					
11.	Average net assets for the period (in millions)	$2,883	$4,767	$7,594	$2,269	$774
12.	Ratio of gross expenses to average net assets	0.94%	0.91%	0.91%	0.95%	1.01%
13.	Ratio of net expenses to average net assets	0.91%	0.89%	0.90%	0.93%	0.98%
14.	Ratio of net investment income/(loss) to average net assets	(0.13%)	0.34%	0.51%	0.06%	(0.21%)
15.	Portfolio turnover rate	90%	118%	96%	91%	123%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Orion Fund

		Years or period ended October 31st		
		2002	2001	2000[1]
1.	**Net asset value, beginning of period**	**$5.21**	**$8.81**	**$10.00**
	Income from investment operations:			
2.	Net investment income	-	-	0.02
3.	Net gains or (losses) on securities (both realized and unrealized)	(0.88)	(3.58)	(1.21)
4.	Total from investment operations	(0.88)	(3.58)	(1.19)
	Less distributions			
5.	Dividends (from net investment income)	-	(0.02)	-
6.	Distributions (from capital gains)	-	-	-
7.	Total distributions	-	(0.02)	-
8.	**Net asset value, end of period**	**$4.33**	**$5.21**	**$8.81**
9.	Total return*	(16.70%)	(40.69%)	(11.90)%
10.	Net assets, end of period (in millions)	$422	$602	$1,128
11.	Average net assets for the period (in millions)	$563	$762	$1,087
12.	Ratio of gross expenses to average net assets**	1.09%	1.06%	1.14%
13.	Ratio of net expenses to average net assets**	1.04%	1.03%	1.12%
14.	Ratio of net investment income/(loss) to average net assets**	(0.30%)	(0.06%)	0.82%
15.	Portfolio turnover rate**	161%	206%	35%

(1) Fiscal period from June 30, 2000 (inception) to October 31, 2000.

* Total return is not annualized for periods of less than one full year.

** Annualized for periods of less than one full year.

Janus Global Life Sciences Fund

		Years or period ended October 31st			
		2002	2001	2000	1999[1]
1.	**Net asset value, beginning of period**	**$16.96**	**$22.41**	**$11.97**	**$10.00**
	Income from investment operations:				
2.	Net investment income	-	-	0.02	-
3.	Net gains or (losses) on securities (both realized and unrealized)	(4.14)	(5.43)	10.42	1.97
4.	Total from investment operations	(4.14)	(5.43)	10.44	1.97
	Less distributions:*				
5.	Dividends (from net investment income)	-	(0.02)	-	-
6.	Distributions (from capital gains)	-	-	-	-
7.	Total distributions	-	(0.02)	-	-
8.	**Net asset value, end of period**	**$12.82**	**$16.96**	**$22.41**	**$11.97**
9.	Total return**	(24.35%)	(24.26%)	87.22%	19.70%
10.	Net assets, end of period (in millions)	$1,390	$2,415	$4,267	$344
11.	Average net assets for the period (in millions)	$1,928	$2,958	$2,987	$228
12.	Ratio of gross expenses to average net assets***	0.89%	0.93%	0.97%	1.21%
13.	Ratio of net expenses to average net assets***	0.88%	0.91%	0.94%	1.19%
14.	Ratio of net investment income/(loss) to average net assets***	(0.42%)	(0.32%)	0.14%	(0.41%)
15.	Portfolio turnover rate***	73%	84%	147%	235%

(1) Fiscal period from December 31, 1998 (inception) to October 31, 1999.

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

** Total return is not annualized for periods of less than one full year.

*** Annualized for periods of less than one full year.

Janus Global Technology Fund

		Years or period ended October 31st			
		2002	2001	2000	1999[1]
1.	**Net asset value, beginning of period**	**$10.83**	**$27.44**	**$20.95**	**$10.00**
	Income from investment operations:				
2.	Net investment income	(0.01)	0.36	(0.02)	-
3.	Net gains or (losses) on securities (both realized and unrealized)	(3.41)	(16.64)	6.71	10.95
4.	Total from investment operations	(3.42)	(16.28)	6.69	10.95
	Less distributions:*				
5.	Dividends (from net investment income)	-	(0.16)	(0.02)	-
6.	Distributions (from capital gains)	-	-	(0.18)	-
7.	Tax return of capital	-	(0.17)	-	-
8.	Total distributions	-	(0.33)	(0.20)	-
9.	**Net asset value, end of period**	**$7.41**	**$10.83**	**$27.44**	**$20.95**
10.	Total return**	(31.67%)	(59.95%)	31.99%	109.40%
11.	Net assets, end of period	$1,250	$2,276	$7,564	$3,335

	(in millions)				
12.	Average net assets for the period (in millions)	$1,907	$4,010	$8,884	$1,266
13.	Ratio of gross expenses to average net assets***	0.96%	0.92%	0.91%	1.04%
14.	Ratio of net expenses to average net assets***	0.94%	0.90%	0.90%	1.02%
15.	Ratio of net investment income/(loss) to average net assets***	(0.14%)	0.55%	0.17%	(0.11%)
16.	Portfolio turnover rate***	66%	60%	47%	31%

(1) Fiscal period from December 31, 1998 (inception) to October 31, 1999.

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

** Total return is not annualized for periods of less than one full year.

*** Annualized for periods of less than one full year.

Janus Global Value Fund

		Year or Period Ended October 31st	
		2002	2001[1]
1.	**Net asset value, beginning of period**	**$9.68**	**$10.00**
	Income from investment operations:		
2.	Net investment income/(loss)	0.03	0.02
3.	Net gains or (losses) on securities (both realized and unrealized)	(1.04)	(0.34)
4.	Total from investment operations	(1.01)	(0.32)
	Less distributions:		
5.	Dividends (from net investment income)	(0.02)	-
6.	Distributions (from capital gains)	(0.01)	-
7.	Total distributions	(0.03)	-
8.	**Net asset value, end of period**	**$8.64**	**$9.68**
9.	Total return*	(10.59%)	(3.10%)
10.	Net assets, end of period (in millions)	$149	$63
11.	Average net assets for the period (in millions)	$155	$55
12.	Ratio of gross expenses to average net assets**	1.19%	1.52%
13.	Ratio of net expenses to average net assets**	1.16%	1.50%
14.	Ratio of net investment income/(loss) to average net assets**	0.40%	0.64%
15.	Portfolio turnover rate**	84%	0%

(1) Fiscal period from June 29, 2001 (inception) to October 31, 2001.

* Total return is not annualized for periods of less than one full year.

** Annualized for periods of less than one full year.

Janus Worldwide Fund

		Years ended October 31st				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$40.17**	**$70.74**	**$58.87**	**$41.52**	**$40.05**
	Income from investment operations:					
2.	Net investment income	0.27	0.39	0.03	0.02	1.26
3.	Net gains or (losses) on securities (both realized and unrealized)	(7.56)	(24.04)	13.15	17.51	3.01
4.	Total from investment operations	(7.29)	(23.65)	13.18	17.53	$4.27
	Less distributions:*					
5.	Dividends (from net investment income)	(0.01)	(0.41)	(0.03)	(0.18)	(1.35)
6.	Distributions (from capital gains)	-	(6.51)	(1.28)	-	(1.45)
7.	Total distributions	(0.01)	(6.92)	(1.31)	(0.18)	(2.80)
8.	**Net asset value, end of period**	**$32.87**	**$40.17**	**$70.74**	**$58.87**	**$41.52**
9.	Total return	(18.15%)	(36.56%)	22.41%	42.33%	11.40%
10.	Net assets, end of period (in millions)	$13,456	$20,331	$37,775	$24,091	$13,932
11.	Average net assets for the period (in millions)	$18,185	$27,993	$38,727	$18,893	$13,078
12.	Ratio of gross expenses to average net assets	0.87%	0.87%	0.88%	0.89%	0.92%
13.	Ratio of net expenses to average net assets	0.86%	0.85%	0.86%	0.88%	0.90%
14.	Ratio of net	0.62%	0.53%	0.13%	0.07%	0.47%

	investment income/(loss) to average net assets					
15.	Portfolio turnover rate	73%	78%	58%	68%	86%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Balanced Fund

		Years ended October 31st				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$19.27**	**$22.83**	**$21.79**	**$17.22**	**$16.73**
	Income from investment operations:					
2.	Net investment income	0.47	0.56	0.61	0.42	0.33
3.	Net gains or (losses) on securities (both realized and unrealized)	(1.20)	(2.48)	1.33	4.69	2.09
4.	Total from investment operations	(0.73)	(1.92)	1.94	5.11	2.33
	Less distributions:*					
5.	Dividends (from net investment income)	(0.46)	(0.61)	(0.58)	(0.43)	(0.35)
6.	Distributions (from capital gains)		(1.03)	(0.32)	(0.11)	(1.49)
7.	Total distributions	(0.46)	(1.64)	(0.90)	(0.54)	(1.84)
8.	**Net asset value, end of period**	**$18.08**	**$19.27**	**$22.83**	**$21.79**	**$17.22**
9.	Total return	(3.85%)	(8.83%)	8.93%	29.89%	15.48%
10.	Net assets, end	$3,936	$4,410	$4,773	$2,930	$830

	of period (in millions)					
11.	Average net assets for the period (in millions)	$4,278	$4,663	$4,072	$1,954	$537
12.	Ratio of gross expenses to average net assets	0.86%	0.85%	0.87%	0.92%	1.03%
13.	Ratio of net expenses to average net assets	0.84%	0.83%	0.85%	0.91%	1.01%
14.	Ratio of net investment income/(loss) to average net assets	2.44%	2.79%	2.92%	2.37%	2.34%
15.	Portfolio turnover rate	88%	117%	87%	64%	73%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Core Equity Fund

		Years ended October 31st				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$16.78**	**$24.25**	**$22.57**	**$15.59**	**$13.98**
	Income from investment operations:					
2.	Net investment income	0.11	0.17	0.15	0.14	0.05
3.	Net gains or (losses) on securities (both realized and unrealized)	(1.81)	(4.98)	2.25	7.17	2.47
4.	Total from investment operations	(1.70)	(4.81)	2.40	7.31	2.52
	Less distributions:*					
5.	Dividends (from net investment income)	(0.09)	(0.13)	(0.14)	(0.15)	(0.03)
6.	Distributions (from capital gains)	-	(2.53)	(0.58)	(0.18)	(0.88)
7.	Total distributions	(0.09)	(2.66)	(0.72)	(0.33)	(0.91)
8.	**Net asset value, end of period**	**$14.99**	**$16.78**	**$24.25**	**$22.57**	**$15.59**
9.	Total return	(10.26%)	(21.70%)	10.65%	47.22%	19.21%
10.	Net assets, end of period (in millions)	$707	$733	$1,027	$781	$201
11.	Average net assets for the period (in millions)	$802	$876	$1,019	$571	$134
12.	Ratio of gross expenses to average net assets	0.92%	0.95%	0.95%	1.02%	1.21%
13.	Ratio of net expenses to average net assets	0.89%	0.93%	0.93%	1.01%	1.18%

14.	Ratio of net investment income/(loss) to average net assets	0.66%	0.85%	0.65%	0.81%	0.41%
15.	Portfolio turnover rate	98%	115%	116%	81%	101%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Growth and Income Fund

		Years ended October 31st				
		2002	2001	2000	1999	1998
1.	**Net asset value, beginning of period**	**$27.99**	**$40.88**	**$36.84**	**$26.45**	**$25.07**
	Income from investment operations:					
2.	Net investment income	0.20	0.32	0.18	0.126	0.08
3.	Net gains or (losses) on securities (both realized and unrealized)	(4.28)	(11.24)	5.84	12.27	3.72
4.	Total from investment operations	(4.08)	(10.92)	6.02	12.53	3.80
	Less distributions:*					
5.	Dividends (from net investment income)	(0.21)	(0.35)	(0.14)	(0.27)	(0.04)
6.	Distributions (from capital gains)	-	(1.62)	(1.84)	(1.87)	(2.38)
7.	**Total distributions**	(0.21)	(1.97)	(1.98)	(2.14)	(2.42)
8.	**Net asset value, end of period**	**$23.70**	**$27.99**	**$40.88**	**$36.84**	**$26.45**
9.	Total return	(14.62%)	(27.66%)	16.44%	49.59%	16.73%
10.	Net assets, end of period (in millions)	$5,328	$6,575	$9,306	$5,837	$2,819
11.	Average net assets for the period (in millions)	$6,480	$7,758	$8,594	$4,375	$2,479
12.	Ratio of gross expenses to average net assets	0.90%	0.87%	0.89%	0.92%	0.96%
13.	Ratio of net expenses to average net	0.88%	0.86%	0.88%	0.90%	0.94%

	assets					
14.	Ratio of net investment income/(loss) to average net assets	0.73%	0.96%	0.49%	0.37%	0.33%
15.	Portfolio turnover rate	49%	59%	41%	43%	95%

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

Janus Special Equity Fund[1]

		Years or Period ended October 31st		
		2002	2001	2000[2]
1.	**Net asset value, beginning of period**	**$8.42**	**$11.29**	**$10.00**
	Income from investment operations:			
2.	Net investment income	-	0.03	0.01
3.	Net gains or (losses) on securities (both realized and unrealized)	(1.45)	2.65	1.28
4.	Total from investment operations	(1.45)	2.62	1.29
	Less distributions:*			
5.	Dividends (from net investment income)	(0.02)	(0.02)	-
6.	Distributions (from capital gains)	-	(0.23)	-
7.	Total distributions	(0.02)	(0.25)	-
8.	**Net asset value, end of period**	**$6.95**	**$8.42**	**$11.29**
9.	Total return**	(17.23%)	23.61%	12.90%
10.	Net assets, end of period (in millions)	$1,287	$1,955	$3,127
11.	Average net assets for the period (in millions)	$1,808	$2,666	$2,841
12.	Ratio of gross expenses to average net assets***	1.01%	0.92%	1.02%
13.	Ratio of net expenses to average net assets***	0.98%	0.91%	0.99%
14.	Ratio of net investment income/(loss) to average net assets***	0.03%	0.29%	0.14%
15.	Portfolio turnover rate***	60%	77%	72%

(1) Formerly, Janus Strategic Value Fund.

(2) Fiscal period from February 29, 2000 (inception) to October 31, 2000.

* As a result of changes in the accounting standards applicable to the Fund's financial statements, the Fund is no longer required to show certain distribution information as a separate line item. The Fund's current and prior year Financial Highlights reflect this change.

GLOSSARY OF INVESTMENT TERMS

This glossary provides a more detailed description of some of the types of securities, investment strategies and other Instruments in which the Funds may invest. The Funds may invest in these instruments to the extent permitted by their investment objectives and policies. The Funds are not limited by this discussion and may invest in any other types of instruments not precluded by the policies discussed elsewhere in this Prospectus.

1. EQUITY AND DEBT SECURITIES

Bonds are debt securities issued by a company, municipality, government or government agency. The issuer of a bond is required to pay the holder the amount of the loan (or par value of the bond) at a specified maturity and to make scheduled interest payments.

Commercial paper is a short-term debt obligation with a maturity ranging from 1 to 270 days issued by banks, corporations and other borrowers to investors seeking to invest idle cash. The Funds may purchase commercial paper issued in private placements under Section 4(2) of the Securities Act of 1933.

Common stocks are equity securities representing shares of ownership in a company and usually carry voting tights and earn dividends. Unlike preferred stock, dividends on common stock are not fixed but are declared at the discretion of the issuer's board of directors.

Convertible securities are preferred stocks or bonds that pay a fixed dividend or interest pay-

ment and are convertible into common stock at a specified price or conversion ratio.

Debt securities are securities representing money borrowed that must be repaid at a later date. Such securities have specific maturities and usually a specific rate of interest or an original purchase discount.

Depositary receipts are receipts for shares of a foreign-based corporation that entitle the holder to dividends and capital gains on the underlying security. Receipts include those issued by domestic banks (American Depositary Receipts), foreign banks (Global or European Depositary Receipts) and broker-dealers (depositary shares).

Equity securities generally include domestic and; foreign common stocks; preferred stocks; securities convertible into common stocks or preferred stocks; warrants to purchase common or preferred stocks; and other securities with equity characteristics.

Exchange traded funds are index-based investment companies which hold substantially all of their assets in securities representing their specific index.

Fixed-income securities are securities that pay a specified rate of return. The term generally includes short- and long-term government, corporate and municipal obligations that pay a specified rate of interest, dividends or coupons for a specified period of time. Coupon and dividend rates may be fixed for the life of the issue or, in the case of adjustable and floating rate securities, for a shorter period.

High-yield/High-risk bonds are bonds that are rated below investment grade by the primary rating agencies (e.g., BB or lower by Standard & Poor's and Ba or lower by Moody's). Other terms commonly used to describe such bonds include "lower rated bonds," "noninvestment grade bonds" and "junk bonds."

Mortgage- and asset-backed securities are shares in a pool of mortgages or other debt. These securities are generally pass-through securities, which means that principal and interest payments on the underlying securities (less servicing fees) are passed through to shareholders on a pro rata basis. These securities involve prepayment risk, which is the risk that the underlying mortgages or other debt may be refinanced or paid off prior to their maturities during periods of declining interest rates. In that case, a Fund may have to reinvest the proceeds from the securities at a lower rate. Potential market gains on a security subject to prepayment risk may be more limited than potential market gains on a comparable security that is not subject to prepayment risk.

Passive foreign investment companies (PFICs) are any foreign corporations which generate certain amounts of passive income or hold certain amounts of assets for the production of passive income. Passive income includes dividends, interest, royalties, rents and annuities. To avoid taxes and interest that the Funds must pay if these investments are profitable, the Funds may make various elections permitted by the tax laws. These elections could require that the Funds recognize taxable income, which in

turn must be distributed before the securities are sold and before cash is received to pay the distributions.

Preferred stocks are equity securities that generally pay dividends at a specified rate and have preference over common stock in the payment of dividends and liquidation. Preferred stock generally does not carry voting rights.

Rule 144A securities are securities that are not registered for sale to the general public under the Securities Act of 1933, but that may be resold to certain institutional investors.

U.S. government securities include direct obligations of the U.S. government that are supported by its full faith and credit. Treasury bills have initial maturities of less than one year, Treasury notes have initial maturities of one to ten years and Treasury bonds may be issued with any maturity but generally have maturities of at least ten years. U.S. government securities also include indirect obligations of the U.S. government that are issued by federal agencies and government sponsored entities. Unlike Treasury securities, agency securities generally are not backed by the full faith and credit of the U.S. government. Some agency securities are supported by the right of the issuer to borrow from the Treasury, others are supported by the discretionary authority of the U.S. government to purchase the agency's obligations and others are supported only by the credit of the sponsoring agency.

Variable and floating rate securities have variable or floating rates of interest and, under certain limited circumstances, may have varying

principal amounts. Variable and floating rate securities pay interest at rates that are adjusted periodically according to a specified formula, usually with reference to some interest rate index or market interest rate (the "underlying index"). The floating rate tends to decrease the security's price sensitivity to changes in interest rates.

Warrants are securities, typically issued with preferred stock or bonds, that give the holder the right to buy a proportionate amount of common stock at a specified price. The specified price is usually higher than the market price at the time of issuance of the warrant. The right may last for a period of years or indefinitely.

II. FUTURES, OPTIONS AND OTHER DERIVATIVES

Forward contracts are contracts to purchase or sell a specified amount of a financial instrument for an agreed upon price at a specified time. Forward contracts are not currently exchange traded and are typically negotiated on an individual basis. The Funds may enter into forward currency contracts to hedge against declines in the value of securities denominated in, or whose value is tied to, a currency other than the U.S. dollar or to reduce the impact of currency appreciation on purchases of such securities. They may also enter into forward contracts to purchase or sell securities or other financial indices.

Futures contracts are contracts that obligate the buyer to receive and the seller to deliver an instrument or money at a specified price on a specified date. The Funds may buy and sell futures contracts on foreign currencies, securities and financial indices including indices of U.S.

government, foreign government, equity or fixed-income securities. The Funds may also buy options on futures contracts. An option on a futures contract gives the buyer the right, but not the obligation, to buy or sell a futures contract at a specified price on or before a specified date. Futures contracts and options on futures are standardized and traded on designated exchanges.

Indexed/structured securities are typically short- to intermediate-term debt securities whose value at maturity or interest rate is linked to currencies, interest rates, equity securities, indices, commodity prices or other financial indicators. Such securities may be positively or negatively indexed (i.e. their value may increase or decrease if the reference index or instrument appreciates). Indexed/structured securities may have return characteristics similar to direct investments in the underlying instruments and may be more volatile than the underlying instruments. A Fund bears the market risk of an investment in the underlying instruments, as well as the credit risk of the issuer.

Interest rate swaps involve the exchange by two parties of their respective commitments to pay or receive interest (e.g., an exchange of floating rate payments for fixed rate payments).

Options are the right, but not the obligation, to buy or sell a specified amount of securities or other assets on or before a fixed date at a predetermined price. The Funds may purchase and write put and call options on securities, securities indices and foreign currencies. The Funds

may purchase or write such options individually or in combination.

III. OTHER INVESTMENTS, STRATEGIES AND/OR TECHNIQUES

Repurchase agreements involve the purchase of a security by a Fund and a simultaneous agreement by the seller (generally a bank or dealer) to repurchase the security from the Fund at a specified date or upon demand. This technique offers a method of earning income on idle cash. These securities involve the risk that the seller will fail to repurchase the security, as agreed. In that case, a Fund will bear the risk of market value fluctuations until the security can be sold and may encounter delays and incur costs in liquidating the security.

Reverse repurchase agreements involve the sale of a security by a Fund to another party (generally a bank or dealer) in return for cash and an agreement by the Fund to buy the security back at a specified price and timed. This technique will be used primarily to provide cash to satisfy unusually high redemption requests, or for other temporary or emergency purposes.

Short sales in which the Fund may engage may be of two types, short sales "against the box" or "naked" short sales. Short sales against the box involve selling either a security that the Fund owns or a security equivalent in kind or amount to the security sold short that the Fund has the right to obtain, for delivery at a specified date in the future. Naked short sales involve selling a security that the Fund borrows and does not own. The Fund may enter into a short sale to hedge against anticipated declines in the market

price of a security or to reduce portfolio volatility. If the value of a security sold short increases prior to the scheduled delivery date, the Fund loses the opportunity to participate in the gain. For naked short sales, the Fund will incur a loss if the value of a security increases during this period because it will be paying more for the security than it has received from the purchaser in the short sale. If the price declines during this period, the Fund will realize a short-term capital gain. Although the Fund's potential for gain as a result of a short sale is limited to the price at which it sold the security short less the cost of borrowing the security, its potential for loss it theoretically unlimited because there is no limit to the cost of replacing the borrowed security.

When-issued, delayed delivery and forward commitment transactions generally involve the purchase of a security with payment and delivery at some time in the future – i.e., beyond normal settlement. The Funds do not earn interest on such securities until settlement and bear the risk of market value fluctuations in between the purchase and settlement dates. New issues of stocks and bonds, private placements and U.S. government securities may be sold in this manner.

* * *

You can request other information, including a Statement of Additional Information, Annual Report or Semiannual Report, free of charge by contacting your financial intermediary or plan sponsor. The Funds' Statement of Additional Information and most recent Annual and Semiannual Reports are

also available on janus.com. In the Funds' Annual and Semiannual Reports, you will find a discussion of the market conditions and investment strategies that significantly affected the Funds' performance during their last fiscal period. Other information is also available from financial intermediaries that sell shares of the Funds.

The Statement of Additional Information provides detailed information about the Funds and is incorporated into this Prospectus by reference. You may review and copy information about the Funds (including the Funds' Statement of Additional Information) at the Public Reference Room of the SEC or get text only copies, after paying a duplicating fee, by sending an electronic request by e-mail to publicinfo@sec.gov or by writing to or calling the Public Reference Room, Washington, D.C. 20549-0102 (1-202-942-8090). You may also obtain reports and other information about the Funds from the Electronic Data Gathering Analysis and Retrieval (EDGAR) Database on the SEC's Web site at http://www.sec.gov.

JANUS

www.janus.com

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934

Date of Report (Date of earliest event reported)
August 18, 2004

JANUS CAPITAL
GROUP

Janus Capital Group Inc.

(Exact name of registrant as specified in its charter)

DELAWARE	001-15253	43-1804048
(State or other jurisdiction of incorporation)	(Commission file number)	(IRS Employer Identification Number)

151 DETROIT STREET
DENVER, COLORADO 80206

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code
(303) 691-3905

Not Applicable
(Former name or former address if changed since last report)

Item 5. Other Events and Required FD Disclosure.

Janus Capital Group Inc. ("Janus") is filing a press release confirming that it has reached final settlement with the Attorneys General of New York and Colorado, the Colorado Division of Securities and the U.S. Securities and Exchange Commission related to the company's previously disclosed frequent–trading arrangements. A copy of the press release is attached as Exhibit 99.1 to this Current Report on Form 8–K and is incorporated by reference herein.

Item 7. Financial Statements, Pro Forma Financial Information and Exhibits.

Exhibit No.	Exhibit Description
99.1	Janus Capital Group Inc. press release confirming that it has reached final settlement with the Attorneys General of New York and Colorado, the Colorado Division of Securities and the U.S. Securities and Exchange Commission related to the company's previously disclosed frequent–trading arrangements.
99.2	Securities and Exchange Order Instituting Administrative Cease–and–Desist Proceedings.
99.3	Assurance of Discontinuance with the Attorney General of the State of New York

Exhibit No.	Exhibit Description
99.4	Assurance of Discontinuance with the Colorado Attorney General
99.5	Stipulation for Consent Order with the Colorado Division of Securities

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the Company has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Janus Capital Group Inc.

Date: August 18, 2004

By: /s/ Loren M. Starr

Loren M. Starr

Senior Vice President and
Chief Financial Officer

EXHIBIT 99.2

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2277 / August 18, 2004

INVESTMENT COMPANY ACT OF 1940
Release No. 26532 / August 18, 2004

ADMINISTRATIVE PROCEEDING
File No. 3-11590

In the Matter of Janus Capital Management, LLC Respondent.	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940 AND SECTIONS 9(b) AND 9(f) OF THE INVESTMENT COMPANY ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The United States Securities and Exchange Commission (the "Commission") deems it appropriate and in the public interest that administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and

203(k) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Janus Capital Management LLC ("JCM", "Janus" or the "Respondent").

II.

In anticipation of the institution of these proceedings, the Respondent has submitted an Offer of Settlement (the "Offer") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, and without admitting or denying the findings, except those findings pertaining to the jurisdiction of the Commission over it and the subject matter of these proceedings, the Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order") as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Overview

1. This is a proceeding against JCM based on its negotiated, but undisclosed, market timing agree-

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[1] The findings herein are made pursuant to the Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

ments in which JCM permitted 12 entities (the "Market Timers" or "Timers") to market time certain Janus mutual funds while representing to other shareholders that it did not permit frequent trading or market timing in its mutual funds. Market timing includes (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal per se, can harm other mutual fund shareholders because it can dilute the value of their shares, if the market timer is exploiting pricing inefficiencies, or disrupt the management of the mutual fund's investment portfolio and can cause the targeted mutual fund to incur costs borne by other shareholders to accommodate frequent buying and selling of shares by the market timer.

2. Some of the timing agreements were entered into with the understanding that the Market Timer would make long term investments, so—called "sticky assets," in certain Janus mutual funds. In addition, JCM waived all redemption fees that would have otherwise been assessed against the Market Timers for their frequent trading activity.

3. The market timing agreements financially benefited JCM in that JCM realized additional advisory fees from the timed funds and sticky assets under its management. Because of JCM's financial interest in the increased assets under management, JCM had a conflict of interest with the Janus mutual funds subject to the market timing agreements. JCM failed to disclose the conflict of interest-to the Board of Trustees and the shareholders of the affected mutual funds, thereby breaching JCM's fiduciary duty to the mutual funds.

4. At the same time JCM entered into and maintained market timing agreements, the prospectuses for the funds being timed stated, or at least strongly implied, that JCM did not permit frequent trading or market timing in these funds. In addition to the prohibitions against market timing contained in its prospectuses, JCM regularly monitored and policed market timing and frequent trading in the Janus funds and took steps to stop such trading when it was identified, including barring shareholders from the funds.

Respondent

5. JCM, a Delaware limited liability company headquartered in Denver, Colorado, is registered with the Commission as an investment adviser pursuant to Section 203(c) of the Advisers Act. JCM serves as the investment adviser to certain mutual funds. JCM is a wholly owned subsidiary of Janus Capital Group Inc. ("JCG"), a public holding company whose stock trades on the New York Stock Exchange.

Facts

JCM's Market Timing Agreements

6. Between November 2001 and September 2003, JCM entered into or maintained agreements with 12 Market Timers that allowed those entities to "market time" mutual funds for which JCM was the investment adviser. These agreements permitted the Market Timers to trade far more frequently than other shareholders and, in some cases, to make frequent trades of up to tens of millions of dollars each in the mutual funds. Certain members of JCM's senior management and certain portfolio managers knew about, or were reckless in not knowing about, the approved market timing relationships.

7. Certain members of JCM's sales group negotiated the market timing agreements orally or through email communications and did not otherwise document agreements with the Market Timers in written contracts. Under these agreements, JCM usually negotiated a certain number of "round trips" allowed within a given time frame and a maximum dollar amount for each exchange.

8. After negotiating the market timing agreements, the sales group communicated the terms of the agreements to JCM's operations group to help ensure that all approved timing activity was timely processed and not restricted as part of JCM's normal practice of monitoring and restricting market timing in Janus funds. By 2003, JCM's operations group began maintaining a list of approved Market Timers. By June 2003, that list included specific information about the agreements such as the client contact, the names of the funds approved for frequent trading, dollar trade limits, number of approved trades, and total dollar amount invested.

9. Certain Janus funds in which Market Timers engaged in frequent trading assessed redemption fees. These redemption fees were adopted to offset brokerage commissions and other costs associated with changes in the mutual funds' asset level and cash flow due to short–term trading. A single such fund assessed redemption fees for the entire time period from November 2001 through August 2003. Other such funds assessed redemption fees beginning in March or June 2003. As part of its agreements with the Market Timers, JCM waived redemption fees for their trading in these funds.

10. In connection with some of its market timing agreements, JCM required the approved Market

Timer to maintain, or "park," "sticky assets" in Janus mutual funds that were not being timed. In other instances, JCM understood that the total amount of a Market Timer's investments in Janus mutual funds would be substantially greater than the daily trade limits set by JCM for that Market Timer.

11. In addition to the management fees it received from assets being timed by the Market Timers, JCM received additional management fees from the non–timed assets that the Market Timers parked in Janus funds.

12. Most of the market timing under the timing agreements occurred within seven Janus funds.

13. Collectively, the timing activity by the Market Timers caused a substantial amount in dilution to the affected Janus mutual funds.

14. JCM breached its fiduciary duty to the mutual funds subject to the timing agreements by falling to disclose its conflict of interest with the mutual funds arising from the market timing agreements.

JCM's Largest Timer

15. Between November 2001 and September 2003, JCM's single largest timer (the "Largest Timer") was permitted to time at least seven Janus funds, making more than 500 trades that included total purchases of more than $2.5 billion dollars. By the Summer of 2003, the Largest Timer had as much as $263,000,000 invested in Janus funds at any give time.

16. In November 2001, the Largest Timer initially invested in the Janus Mercury Fund as a result of a friendship between a then portfolio manager at JCM and a principal at the Largest Timer. The

Largest Timer began timing the Janus Mercury Fund shortly thereafter, and was permitted to do so by JCM.

17. By April 2002, the Largest Timer began making frequent trades in other Janus funds.

18. During most of the time that it was making frequent trades in Janus mutual funds, the Largest Timer invested additional assets that were substantially greater than the daily trade limits set by JCM for the Largest Timer.

19. JCM did not assess applicable redemption fees against the Largest Timer for its short—term trading activity.

The Funds' Prospectuses Prohibited, and JCM Actively Policed, Market Timing and Frequent Trading in Janus Mutual Funds at the Same Time that JCM Allowed the Approved Market Timers to Time the Funds

20. During the same time period that JCM entered into agreements with the Market Timers and allowed the Market Timers to make frequent trades in the Janus funds, the prospectuses for these funds stated, or at least strongly implied, that JCM did not permit frequent trading or market timing in these funds. The prospectuses also stated that frequent trading in the funds could disrupt portfolio investment strategies and increase fund expenses for all fund shareholders, and stated that the funds were not intended for market timing or excessive trading.

21. Between November 2001 and September 2003, JCM provided these prospectuses to shareholders and prospective shareholders in the funds and filed registration statements containing these prospectuses with the Commission.

22. In an effort to effectuate the prohibition on market timing set forth in the funds' prospectuses, JCM regularly monitored and policed market timing and frequent trading in the funds and took steps, in certain circumstances, to stop such trading when it was identified, including barring shareholders from the funds. At the same time it was policing market timing and frequent trading, and prohibiting other shareholders from engaging in it, JCM allowed the Market Timers to engage in these practices.

23. In the Fall of 2002, as part of JCM's efforts to combat market timing in Janus mutual funds, JCM's then Chief Executive Officer commissioned an internal study to examine the market timing problem and make recommendations to address the problem. At the conclusion of this study, a report was prepared that highlighted the adverse impacts associated with market timing in mutual funds, identified the fact that JCM had approved market timing agreements, and recommended that these agreements be terminated.

24. More than 30 people at JCM, including several members of senior management, received a copy of this market timing report. Nevertheless, JCM did not terminate its approved market timing relationships at this time and continued to enter into agreements with Market Timers until July 2003.

Violations

25. As a result of the conduct described above, JCM willfully violated Sections 206(1) and 206(2) of the Advisers Act in that, while acting as an investment adviser, it employed devices, schemes, or artifices to defraud clients or prospective clients, and engaged in transactions, practices, or courses of business which operated or would operate as a fraud or

deceit upon clients or prospective clients. Specifically, JCM entered into agreements with the Market Timers that created a conflict of interest JCM knowingly or recklessly failed to disclose to the Board of Trustees of the funds and that were inconsistent with the funds' prospectus disclosures.

26. As a result of the conduct described above, JCM willfully violated Section 34(b) of the Investment Company Act in that it made an untrue statement of material fact in a registration statement, application, report, account, record, or other document filed or transmitted pursuant to the Investment Company Act, or omitted to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading. For example, JCM filed several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds.

27. As a result of the conduct described above, JCM, an affiliated person of the timed mutual funds, willfully violated Section 17(d) of the Investment Company Act and Rule 17d-1 thereunder, in that, while acting as a principal, it participated in and effected transactions in connection with joint arrangements in which the funds were participants without filing an application with the Commission and obtaining a Commission order approving the transactions.

Undertakings

28. In determining to accept the Offer, the Commission has considered the following efforts voluntarily undertaken by JCM:

a. JCM will use its best efforts to cause the Janus funds to operate in accordance with the following governance policies and practices, which the funds have represented are currently in effect:

   i. No more than 25 percent of the members of the Board of Trustees of any Janus fund will be persons who either (a) were directors, officers or employees of JCM at any point during the preceding 10 years or (b) are interested persons, as defined in the Investment Company Act, of the fund or of JCM. In the event that the Board of Trustees fails to meet this requirement at any time due to the death, resignation, retirement or removal of any independent Trustee, the independent Trustees will take such steps as may be necessary to bring the Board in compliance within a reasonable period of time;

   ii. No chairman of the Board of Trustees of any Janus fund will either (a) have been a director, officer or employee of JCM at any point during the preceding 10 years or (b) be an interested person, as defined in the Investment Company Act, of the fund or of JCM; and

   iii Any person who acts as counsel to the independent Trustees of any Janus fund will be an "independent legal counsel" as defined by Rule 0–1 under the Investment Company Act.

b. No action will be taken by the Board of Trustees or by any committee thereof unless such action is approved by a majority of the mem-

bers of the Board of Trustees or of such committee, as the case may be, who are not neither (i) persons who were directors, officers of employees of JCM at any point during the preceding 10 years nor (ii) interested persons, as defined in the Investment Company Act, of the fund or of JCM. In the event that any action proposed to be taken by and approved by a vote of a majority of the independent Trustees of a fund is not approved by the Board of Trustees, the fund will disclose such proposal and the related Board vote in its shareholder report for such period.

c. Commencing in 2005 and not less than every fifth calendar year thereafter, each Janus fund will hold a meeting of shareholders at which the Board of Trustees will be elected.

d. The Funds shall comply with rule 38a-1 by the earlier of (i) 45 days from the entry of this Order, or (ii) the October 5, 2004 compliance date for the rule as adopted by the Commission. *See Compliance Programs of Investment Companies and Investment Advisers*, Investment Company Act Rel. No. 26299 (Dec. 17, 2003) (adopting release). *See also* Paragraph 30(f), below.

29. Ongoing Cooperation. In determining to accept the Offer, the Commission has considered the following efforts voluntarily undertaken by JCM.

JCM shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, JCM has undertaken:

a. To produce, without service of a notice or subpoena, any and all documents and other information reasonably requested by the Commission's staff;

b. To use its best efforts to cause its employees to be interviewed by the Commission's staff at such times as the staff reasonably may direct;

c. To use its best efforts to cause its employees to appear and testify truthfully and completely without service of a notice or subpoena in such investigations, depositions, hearings or trials as may be requested by the Commission's staff; and

d. That in connection with any testimony of JCM to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, JCM:

   i. Agrees that any such notice or subpoena for JCM's appearance and testimony may be served by regular mail on its attorneys, John Sturc, Esq., Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington D.C., 20036-5306, or James Clark Esq., Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California, 90071-3197; and

   ii. Agrees that any such notice or subpoena for JCM's appearance and testimony in an action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure.

30. Compliance and Ethics Oversight Structure. JCM shall maintain a compliance and ethics oversight infrastructure having the following characteristics:

a. JCM shall maintain a Code of Ethics Oversight Committee having responsibility for all matters relating to issues arising under the JCM Code of Ethics. The Code of Ethics Oversight Committee shall be comprised of senior managers of JCM's business units. JCM shall hold at least quarterly meetings of the Code of Ethics Oversight Committee to review violations of the Code of Ethics, as well as to consider policy matters relating to the Code of Ethics. JCM shall report on issues arising under the Code of Ethics, including all violations thereof, to the Legal and Regulatory Committee of the Trustees of the Janus funds with such frequency as the Legal and Regulatory Committee may instruct, and in any event at least quarterly, provided however that any material violation shall be reported promptly.

b. JCM shall establish an Internal Compliance Controls Committee to be chaired by JCM's Chief Compliance Officer, which Committee shall have as its members senior managers of JCM's business units. Notice of all meetings of the Internal Compliance Controls Committee shall be given to the independent Trustees of the Janus funds, who shall be invited to attend and participate in such meetings. The Internal Compliance Controls Committee shall review compliance issues throughout the business of JCM, endeavor to develop

solutions to those issues as they may arise from time to time, and oversee implementation of those solutions. The Internal Compliance Controls Committee shall provide reports on internal compliance matters to the Legal and Regulatory Committee of the Trustees of the Janus funds with such frequency as the independent Trustees of such funds may instruct, and in any event at least quarterly. JCM shall also provide to the Audit Committee of JCG the same reports of the Code of Ethics Oversight Committee and the Internal Compliance Controls Committee that it provides to the Legal and Regulatory Committee of the Janus funds.

c. JCM shall establish and staff a full–time senior–level position whose responsibilities shall include compliance matters related to conflicts of interests. This officer will report directly to the Chief Compliance Officer of JCM.

d. JCM shall require the Chief Compliance Officer of JCM to report to the independent Trustees of the Janus funds any breach of fiduciary duty and/or the federal securities laws of which he or she becomes aware in the course of carrying out his or her duties, with such frequency as the independent Trustees may instruct, and in any event at least quarterly, provided however that any material breach (i.e., any breach that would be important, qualitatively or quantitatively, to a reasonable Trustee) shall be reported promptly.

e. JCM shall establish a corporate ombudsman to whom JCM employees may convey con-

cerns about JCM business matters that they believe implicate matters of ethics or questionable practices. JCM shall establish procedures to investigate matters brought to the attention of the ombudsman, and these procedures shall be presented for review and approval by the independent Trustees of the Janus funds. JCM shall also review matters brought to the attention of the ombudsman, along with any resolution of such matters, with the independent Trustees of the Janus funds with such frequency as the independent Trustees of such funds may instruct.

f. JCM shall comply with Rule 206(4)-7 by the earlier of (i) 45 days from the entry of this Order, or (ii) the October 5, 2004 compliance date for the rule as adopted by the Commission. *See Compliance Programs of Investment Companies and Investment Advisers*, Investment Company Act Rel. no. 26299 (Dec. 17, 2003) (adopting release). *See also*, Paragraph 28(d), above.

31. Independent Compliance Consultant. JCM shall retain, within 90 days of the date of entry of the Order, the services of an Independent Compliance Consultant not unacceptable to the staff of the Commission and a majority of the independent Trustees of the Janus funds. The Independent Compliance Consultant's compensation and expenses shall be borne exclusively by JCM or its affiliates. JCM shall require the Independent Compliance Consultant to conduct a comprehensive review of JCM's supervisory, compliance, and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the Code of Ethics and fed-

eral securities law violations by JCM and its employees. This review shall include, but shall not be limited to, a review of JCM's market timing controls across all areas of its business, a review of the Janus funds' pricing practices that may make those funds vulnerable to market timing, a review of the Janus funds' utilization of short term trading fees and other controls for deterring excessive short term trading, and a review of JCM's policies and procedures concerning conflicts of interest, including conflicts arising from advisory services to multiple clients. JCM shall cooperate fully with the Independent Compliance Consultant and shall provide the Independent Compliance Consultant with access to its files, books, records, and personnel as reasonably requested for the review.

a. JCM shall require that, at the conclusion of the review, which in no event shall be more than 180 days after the date of entry of the Order, the Independent Compliance Consultant shall submit a Report to JCM, the Trustees of the Janus funds, and the staff of the Commission. The Report shall address the issues described in subparagraph 31 of these undertakings, and shall include a description of the review performed, the conclusions reached, the Independent Compliance Consultant's recommendations for changes in or improvements to policies and procedures of JCM and the Janus funds, and a procedure for implementing the recommended changes in or improvements to JCM's policies and procedures.

b. JCM shall adopt all recommendations with respect to JCM contained in the Report of the

Independent Compliance Consultant; provided, however, that within 210 days after the date of entry of the Order, JCM shall in writing advise the Independent Compliance Consultant, the Trustees of the Janus funds and the staff of the Commission of any recommendations that it considers to be unnecessary or inappropriate. With respect to any recommendation that JCM considers unnecessary or inappropriate, JCM need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose.

c. As to any recommendation with respect to JCM's policies and procedures on which JCM and the Independent Compliance Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 240 days of the date of entry of the Order. In the event JCM and the Independent Compliance Consultant are unable to agree on an alternative proposal acceptable to the staff of the Commission, JCM will abide by the determinations of the Independent Compliance Consultant.

d. JCM (i) shall not have the authority to terminate the Independent Compliance Consultant, without the prior written approval of the majority of the independent Trustees and the staff of the Commission; (ii) shall compensate the Independent Compliance Consultant, and persons engaged to assist the Independent Compliance Consultant, for services rendered pursuant to the Order at their

reasonable and customary rates; and, (iii) shall not be in and shall not have an attorney–client relationship with the Independent Compliance Consultant and shall not seek to invoke the attorney–client or any other doctrine or privilege to prevent the Independent Compliance Consultant from transmitting any information, reports, or documents to the Trustees or the Commission.

e. JCM shall require that the Independent Compliance Consultant, for the period of the engagement and for a period of two years from completion of the engagement, shall not enter into any employment, consultant, attorney–client, auditing or other professional relationship with JCM, or any of its present or former affiliates, directors, officer, employees, or agents acting in their capacity as such. JCM shall require that any firm with which the Independent Compliance Consultant is affiliated in performance of his or her duties under the Order shall not, without prior written consent of the independent Trustees and the staff of the Commission, enter into any employment, consultant, attorney–client, auditing or other professional relationship with JCM, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

32. Periodic Compliance Review. Commencing in 2006, and at least once every other year thereafter, JCM shall undergo a compliance review by a third party, who is not an interested person, as defined in

the Investment Company Act, of JCM. At the conclusion of the review, the third party shall issue a report of its findings and recommendations concerning JCM's supervisory, compliance, and other policies and procedures designed to prevent and detect breaches of fiduciary duty, breaches of the Code of Ethics and federal securities law violations by JCM and its employees in connection with their duties and activities on behalf of and related to the Janus funds. Each such report shall be promptly delivered to JCM's Internal Compliance Controls Committee and to the Legal and Regulatory Committee of the Board of Trustees of each Janus fund.

33. Independent Distribution Consultant. JCM shall retain, within 90 days of the date of entry of the Order, the services of an Independent Distribution Consultant not unacceptable to the staff of the Commission and the independent Trustees of the Janus funds. The Independent Distribution Consultant's compensation and expenses shall be borne exclusively by JCM. JCM shall cooperate fully with the Independent Distribution Consultant and shall provide the Independent Distribution Consultant with access to its files, books, records, and personnel as reasonably requested for the review. JCM shall require that the Independent Distribution Consultant develop a Distribution Plan for the distribution of all of the disgorgement and penalty ordered in Section IV, Paragraph C of the Order, and any interest or earnings thereon, according to a methodology developed in consultation with JCM and acceptable to the staff of the Commission and the independent Trustees of the Janus funds. The Distribution Plan shall provide for investors to receive, from the monies available for distribution in order of priority, (i) their proportionate share of losses suffered by the

fund due to market timing, and (ii) a proportionate share of advisory fees paid by funds that suffered such losses during the period of such market timing.

a. JCM shall require that the Independent Distribution Consultant submit a Distribution Plan to JCM and the staff of the Commission no more than 160 days after the date of entry of the Order.

b. The Distribution Plan developed by the Independent Distribution Consultant shall be binding unless, within 190 days after the date of entry of the Order, JCM or the staff of the Commission advises, in writing, the Independent Distribution Consultant of any determination or calculation from the Distribution Plan that it considers to be inappropriate and states in writing the reasons for considering such determination or calculation inappropriate.

c. With respect to any determination or calculation with which JCM or the staff of the Commission do not agree, such parties shall attempt in good faith to reach an agreement within 220 days of the date of entry of the Order. In the event that JCM and the staff of the Commission are unable to agree on an alternative determination or calculation, the determinations and calculations of the Independent Distribution Consultant shall be binding.

d. Within 235 days of the date of entry of this Order, JCM shall require that the Independent Distribution Consultant submit the Distribution Plan for the administration and distribution of disgorgement and penalty

funds pursuant to Rule 1101 [17 C.F.R. § 201.1101] of the Commission's Rules Regarding Disgorgement and Fair Fund Plans. Following a Commission order approving a final plan of disgorgement, as provided in Rule 1104 [17 C.F.R. § 201.1104] of the Commission's Rules Regarding Disgorgement and Fair Fund Plans, JCM shall require that the Independent Distribution Consultant, with JCM, take all necessary and appropriate steps to administer the final plan for distribution of disgorgement and penalty funds.

e. JCM shall require that the Independent Distribution Consultant, for the period of the engagement and for a period of two years from completion of the engagement, not enter into any employment, consultant, attorney—client, auditing or other professional relationship with JCM, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. JCM shall require that any firm with which the Independent Distribution Consultant is affiliated in performance of his or her duties under the Order not, without prior written consent of a majority of the independent Trustees and the staff of the Commission, enter into any employment, consultant, attorney—client, auditing or other professional relationship with JCM, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

34. Certification. No later than twenty–four months after the date of entry of the Order, the chief executive officer of JCM shall certify to the Commission in writing that JCM has fully adopted and complied in all material respects with the undertakings set forth in this section III and with the recommendations of the Independent Compliance Consultant or, in the event of material non–adoption or non–compliance, shall describe such material non–adoption and non–compliance.

35. Recordkeeping. JCM shall preserve for a period not less than six years from the end of the fiscal year last used, the first two years in an easily accessible place, any record of JCM's compliance with the undertakings set forth in this section III.

36. Deadlines. For good cause shown, the Commission's staff may extend any of the procedural dates set forth above.

IV.

In view of the foregoing, the Commission deems it appropriate in the public interest and for the protection of investors to impose the sanctions agreed to in JCM's Offer. Accordingly, it is hereby ORDERED, effective immediately, that:

A. Pursuant to Section 203(e) of the Advisers Act, JCM is hereby censured.

B. Pursuant to Section 203(k) of the Advisers Act and Section 9(f) of the Investment Company Act, JCM shall cease and desist from committing or causing any violations and any future violations of Sections 206(1) and 206(2) of the Advisers Act and Sections 17(d) and 34(b) of the Investment Company Act and Rule 17d-1 thereunder.

C. JCM shall comply with the undertakings set forth in paragraphs 30 through 35 above.

D. Disgorgement and Civil Money Penalties

1. JCM shall pay disgorgement in the total amount of $50 million ("Disgorgement") and a civil money penalties in the amount of $50 million ("Penalties"), for a total payment of $100 million.

2. There shall be, pursuant to Section 308(a) of the Sarbanes–Oxley Act of 2002, a Fair Fund established for the funds described in Section IV.D.1. Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, JCM agrees that it shall not, after offset or reduction in any Related Investor Action for the amount of the disgorgement paid by it, further benefit by offset or reduction of any part of the civil penalty paid by it ("JCM Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, JCM agrees that it shall, within 30 days after entry of a final order granting the offset or reduction, notify the Commission's counsel in this action and pay the amount of the JCM Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed against JCM in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against JCM by or on behalf of one or more investors based on substantially the same facts as those set forth in the Order.

3. Pursuant to an escrow agreement not unacceptable to the staff of the Commission, JCM shall, within 30 days of the entry of this Order, pay the funds described in Section IV.D.1. into an escrow account. The escrow agreement shall, among other things: (1) require that all funds in escrow be invested as soon as reasonably possible and to the extent practicable in short–term U.S. Treasury securities with maturities not to exceed six months; (2) name an escrow agent who shall be appropriately bonded; and (3) provide that escrowed funds be disbursed only pursuant to an order of the Commission. JCM shall be responsible for all costs associated with the escrow agreement.

E. Other Obligations and Requirement. Nothing in this Order shall relieve JCM or any Janus fund of any other applicable legal obligation or requirement, including any rule adopted by the Commission subsequent to this Order.

By the Commission.

Jonathan G. Katz

Secretary

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934

Date of Report (Date of earliest event reported)
April 17, 2003

JANUS CAPITAL GROUP INC.

(Exact name of registrant as specified in its charter)

DELAWARE	**001-15253**	**43-1804048**
(State or other jurisdiction of incorporation)	(Commission file number)	(IRS Employer Identification Number)

100 FILLMORE STREET
DENVER, COLORADO 80206
(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code
(303) 691-3905

Not Applicable

(Former name or former address
if changed since last report)

Item 7. Financial Statements and Exhibits

(c) Exhibits

Exhibit No.	Document
99.1	Press release issued by Janus Capital Management LLC (a wholly–owned subsidiary of Janus Capital Group Inc.) announcing the retirement of Helen Young Hayes.

Item 9. Regulation FD Disclosure

On April 17, 2003, Janus Capital Management LLC (a wholly–owned subsidiary of Janus Capital Group Inc.) issued a press release announcing the retirement of Helen Young Hayes.

A copy of the press release is being furnished as Exhibit 99.1 to this Current Report and is incorporated herein by this reference.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the Company has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Janus Capital Group Inc.

Date: April 17, 2003

By: /s/ Mark B. Whiston

Mark B. Whiston

Vice Chairman of the
Board, President,
Chief Executive Officer
and Director

Exhibit 99.1

Date: April 17, 2003

Contacts: Blair Johnson, 720-210-1439
Shelley Peterson, 303-316-5625

JANUS ANNOUNCES INVESTMENT MANAGEMENT CHANGES

Will Initiate Search for Chief Investment Officer

DENVER — Janus Capital Management LLC (JCM) announced today that Helen Young Hayes, co-portfolio manager of Janus Worldwide Fund and Janus Overseas Fund and JCM's managing director of investments, will retire from her daily responsibilities June 16, 2003. To ensure a smooth transition of her portfolio and investment team oversight responsibilities, Hayes will remain at JCM until the end of 2003, after which she plans to retire from the asset management business.

Laurence Chang, co-portfolio manager of Janus Worldwide Fund, and Brent Lynn, co-portfolio manager of Janus Overseas Fund, will assume lead management responsibility for those funds.

Chang has worked with Hayes for 10 years and has been co-portfolio manager of Janus Worldwide Fund since September 1999. In addition to managing Janus Worldwide Fund, Chang manages separate accounts and institutional commingled funds in the global growth discipline. He was co-portfolio manager of Janus Overseas Fund from April 1998 to December 2000. He joined Janus as an analyst on the international team in June 1993.

Lynn has worked with Hayes for 12 years and has been co-portfolio manager of Janus Overseas Fund since January 2001. He joined Janus in April 1991 as a research analyst and has specialized in international markets since 1993.

"Laurence and Brent are two seasoned and highly skilled portfolio managers who've made significant contributions to these funds," said Janus Capital Group's Chief Executive Officer Mark Whiston. "We're fortunate to be able to leverage their experience and ensure continuity in our international franchise."

Whiston, who has worked with Hayes for more than 11 years, said she'll leave an "indelible stamp" on Janus.

"Helen's retirement closes the chapter on a remarkable 19-year career during which she emerged as one of the industry's leading international portfolio managers," Whiston added. "During her time at Janus, she helped shape the firm's research-intensive culture while building one of the most respected international investment teams in the business. Her contributions to the growth and success of Janus have been immeasurable."

Hayes came to Janus in May 1987 from Fred Alger Management in New York. She has managed or co-managed Janus Worldwide Fund and Janus Overseas Fund since their inceptions in May 1991 and May 1994, respectively. Under her leadership, the global and international assets of the firm had grown to more than $21 billion as of March 31, 2003. In February 2002, she was appointed managing director of investments. Among many distinctions, Hayes was named Morningstar's International Fund Manager of the Year in 1997.

Two other members of Janus' 10-person international investment team — Doug Kirkpatrick and Garth Yettick — will assist Chang and Lynn in managing the funds.

Kirkpatrick, who is assistant portfolio manager of Janus Worldwide Fund, will continue working with Chang. Prior to joining Janus in April 2001, he analyzed international companies for the investment firm Artisan Partners L.P.

Yettick, a research analyst primarily focused on international technology, has been promoted to assistant portfolio manager to work with Lynn on Janus Overseas Fund. Before joining Janus in October 1997, Yettick was a senior analyst at First Manhattan Consulting Group, where he served as a management consultant to financial institutions and the International Monetary Fund.

Hayes said she would miss Janus, but has "complete confidence" in her co–portfolio managers and the company's management team.

"During my 16 years at Janus, I've always taken great pride in our people, culture and passion for bottom–up stockpicking," Hayes said. "In the last two years, we've made tremendous strides in strengthening the investment team as well as the overall company. After working closely with Laurence and Brent on every aspect of fund management for more than a decade, I know they're ready to assume the reins. With a strong board of directors, a talented new leader in Mark Whiston and a sharpened focus, the company is well positioned for success. That's why I feel that now is the right time for me to retire."

Janus to Initiate Search for Chief Investment Officer

With Hayes' announcement, Whiston said he's initiating a search for a chief investment officer (CIO) for Janus Capital Management Whiston and two Janus Capital Group board members, Tim Craig and Andrew Cox, will spearhead the search.

Craig was a Janus portfolio manager from 1986 to 2000 and served as the firm's vice chairman and CIO from 1995 to September 2000.

From 1977 through 1988, Cox served as vice president of investments and portfolio manager at the Founders Family of Mutual Funds in Denver. He also was a portfolio manager and security analyst for Berger Associates from 1972 to 1976. Since 1995, Cox has taught portfolio management and security analysis at the University of Denver's Daniels College of Business.

About Janus Capital Management LLC

Janus Capital Management LLC, a subsidiary of Janus Capital Group Inc., is an investment management company with expertise in growth and core equity, specialty fixed–income and money market investments. Founded in 1969 in Denver, Janus has grown to become one of the largest and most successful investment management companies in the United States.

Janus is investment adviser to 24 Janus retail funds, 18 institutional funds in Janus Aspen Series, 15 funds in Janus Adviser Series and 14 offshore funds through Janus International. The firm is also subadvisor for private–label mutual funds and provides

separate account advisory services for institutional investors.

As of March 31, 2003, Janus Capital Group (NYSE: JNS) had $132.7 billion in assets under management.

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For a prospectus containing more information, including charges, risks and expenses, please call Janus at 800-525-3713 or download the file from janus.com. Read it carefully before you invest or send money.

Past performance is no guarantee of future results.

Funds distributed by Janus Distributors LLC (4/03)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

IN RE: MUTUAL FUNDS
INVESTMENT LITIGATION
_____/

MDL No. 1586
Tuesday, March 6, 2007
Baltimore, Maryland

Before: Honorable J. Frederick Motz, Judge

Appearances:

On Behalf of Plaintiffs Wiggins, et al.:
Ira M. Press, Esquire
David A. Bishop, Esquire

On Behalf of Defendants Janus Capital Group, et al.:
Mark A. Perry, Esquire
S. Joy Dowdle, Esquire

(NOTE: Only counsel who verbally participated have been listed.)

Reported by:
Mary M. Zajac, RPR
Room 3515, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

[Page 2]

THE COURT: We're here on a motions hearing in Wiggins versus Janus Capital Group, Inc., on the defendant's Motion to Dismiss the second amended

parent investor class complaint. This, of course, is part of the Mutual Fund MDL litigation.

Hello, everybody. I thought, as I often do, I would tell you my tentative views so that you all know who has the hill to climb. Although yesterday I told that and somebody actually climbed the hill, I think. So I do change my mind once in a while.

Number one, my tentative view is that Janus Capital Management, the complaint should be dismissed for the reasons that I state in my opinion in the Putnam subtrack. I don't think the adviser has a duty to the stockholders of the parent.

As to Janus Capital Group, I am unpersuaded that summary judgment should be granted on the proximate cause ground. It would seem to me that there would have to be discovery on that.

As far as the in-connection-with issue is concerned, I do have some concerns, as I've expressed over the telephone the other day, about the potential breadth of the, essentially of following the holding In re Carter-Wallace, which is essentially what the plaintiffs asked me to do. I can't say that I find the opinion to be wrong or badly reasoned. It just seems to me that the holding may have gotten us to a point where the in-connection-with requirement is essentially superfluous and it **[Page 3]** really has gone, is out. One way of saying it, it really conflates materiality in connection with because every material statement, every market, every statement the market deems to be material under the efficient market theory would then therefore be in connection with.

But I'm not sure how I would articulate where the line should be drawn. To the extent that in-connection-with is, as the defendants point out, is

tied into reliance, it would seem to me that that is a factual issue in all probability, as the remand of In re Carter-Wallace indicated. If an expert could come in and be found by the plaintiffs, and I'm sure one could be, to say that the price of the parent stock was affected by the statement, by the alleged misstatements, had an affect, the market took that into account in valuing the stock of the parent, I would suspect that such testimony could be produced, particularly in light of the fact that so much of the, I forget what it is, but the net revenues of the parent were due so much to the mutual fund.

That said, I still in all likelihood, what I would do in any opinion that I might write would be to say that I don't think the defendant has a winner on the in-connection-with; although I have some concerns that perhaps the Fourth Circuit ought to address because that brings me to the final issue on which I'll express a tentative view, is I don't think that the complaint makes sufficient allegations that Janus Capital Group made the statements, that simply, I'll hear, I won't go into any **[Page 4]** great detail as far as that's concerned. But I think there's an absence of any allegation that JC -- I keep getting my acronyms confused -- JCG made the statements. Aiding and abetting liability obviously does not apply under central Bank of Denver. The mere dissemination of the shares -- excuse me -- of the information, there seems to be plenty of case law which says that that alone is not sufficient to establish liability. And I think the mere use of the logo is not sufficient to meet, to make out the making claim.

So if I were to write an opinion along, use my tentative views, I would deny the motion, I say I would deny the motion on proximate cause grounds.

I probably would grant it on the making grounds. I might write a footnote saying I'm concerned about the breadth of Carter-Wallace. And if the Fourth Circuit were to disagree with me on the making issue, perhaps it would be appropriate for them to address the Carter-Wallace point because if it's winner, and this is what's always concerned me from a litigation management standpoint, if it's a winner I would hate to have the Fourth Circuit tell me that at the end of the case after you all have, after a lot of resources have been spent in litigating this action and then have a dispositive legal point that would have been, would have disposed of the claim in the first instance.

If I grant the motion on the, I wouldn't, I wouldn't do an interlocutory appeal order on that issue. I wouldn't think **[Page 5]** that would be appropriate. But if I grant the motion on the other ground, it would seem to me I could invite the Fourth circuit to address the issue in the event they disagree with me on the making issue.

And I guess the final point is that if I stick to my tentative view after hearing the persuasive arguments of Mr. Bishop and/or Mr. Press, then the control liability issue goes away because control, as I understand the control claim against JCG is based upon the viability of the claim against JCM.

So I guess, although on some issues I am against Mr. Perry, on the bottom line tentatively I'm with Janus. So let me hear from the plaintiffs.

MR. PRESS: Thank you, Your Honor. I will try to address the Court's concerns in order. And I really think that the starting point here in assessing whether or not plaintiffs have pled a claim for liability both against JCG and JCM would be this Court's

prior ruling in the fund investor case, the In Re: Mutual Fund, 384 F. Supp. 2d at 845.

In the In Re: Mutual Fund case, as this Court is well aware, the Court held that plaintiffs there had pled, I suppose on the basis of the e-mails released by the New York attorney general, e-mails that I might add if you look at them, many of them, if not all of them, were the prefix JCG, that the e-mails showed market timing arrangements that were concealed from investors, and that was part of a scheme to defraud. And this **[Page 6]** was something that JCG and JCM both knew of.

THE COURT: But my opinion in the investor case was based upon, and I realize Mr. Perry doesn't accept the soundness of the ruling although he'll distinguish it on this ground, it had to do with the participation in the fraudulent, the alleged fraudulent scheme. And you have not alleged that here. Indeed, you can't allege that here.

You have to rely upon a theory that, in fact, the Janus defendants made the statements, not that they participated somehow in a fraudulent scheme.

MR. PRESS: Well, Your Honor, if I may, in the first instance we did plead scheme liability here as well as misrepresentations. We pled that in the complaint. If you look at paragraph, I'm looking at the second amended complaint here. I believe it's Paragraph 130.

THE COURT: It certainly hasn't been the focus of the briefs.

MR. PRESS: Agreed. If you look at Paragraphs 128 to 130, we certainly alleged a scheme to defraud. And as this Court --

THE COURT: Well, how would, it hasn't been the focus of the briefs. And it really gets us into a far different land because, I mean, the question then becomes how are the, in some attenuated sense I guess they might be deemed victims. But how were they, how were the shareholders of the parent the intended **[Page 7]** victims of the scheme?

MR. PRESS: Well, whether or not they were the intended victims of the scheme, and many of these concepts overlap. We sort of get into the in-connection-with area, and many of the cases --

THE COURT: Wait a second. Does that mean that if somebody's alleged to have engaged in antitrust violations and are found to have committed the violations, that the investors in that company have a securities claim because they engaged in underlying illegal activity that had it been disclosed would have brought down the value of the parent, the security of the company?

MR. PRESS: In many instances, many courts have upheld claims based just on that theory, whether it's the Sotheby's case, the Par Pharmaceuticals case. And in those cases what the courts have held is that it comes down to a question of materiality and foreseeability. And in this case, the materiality of fund conduct, fund performance, investigations, and claims against the fund, really everything involved in the fund, the materiality to JCG is set out very, very clearly in JCG's own SEC filings.

JCG's SEC filings, its 10-K's, say over and over again, our revenues derive primarily from the funds. If the funds do well -- we rise and fall with the funds. If they do well, we do well. If they do poorly, we do poorly.

[Page 8]

As a matter of fact, at one point the defendants, in one of their early Motions to Dismiss, said, and this is at Page 13 of the first Motion to Dismiss by the defendants in this case, the Motion to Dismiss the first complaint, they said Janus Capital's public filings made it abundantly clear that its earnings were dependent upon the level of assets under management in the Janus mutual funds.

And I have cited in the recent letter briefing to several instances where the 10-K of the JCG made it very, very clear that legal proceedings, investigations of the funds will have a material adverse impact on JCG, that JCG's revenues, its profitability, are going to rise and fall with the fortunes and the profitability of the funds.

As a matter of fact, after, just a couple of days after Attorney General Spitzer filed the Canary complaint, JCG issued an announcement on Form 8-K filed with the SEC, this was filed by JCG. It's a public document, SEC filing of JCG. If the Court permits, I would like to hand up a copy.

THE COURT: Sure.

MR. PRESS: And this is an announcement by JCG of steps that were being taken in the wake of the action by the New York attorney general to remedy whatever issues the New York attorney general had identified. Remember, this is a Janus Capital Group, Inc., SEC filing. And the filing says, it starts off by saying Mark Whiston, CEO of Janus Capital Group, today announced **[Page 9]** specific steps the company is taking to address market timing issues raised by the New York attorney general. And then you go to the next paragraph, quotes from Mr. Whis-

ton where they talk about remedial actions. And he says, most of all, we hope this action demonstrates that Janus is committed to living up to the high ethical standards that our shareholders expect of us.

Well, the only reason why JCG's shareholders would care at all about the ethics of the running of the mutual fund is because it was hammered home repeatedly in the 10-K's and other public filings of JCG. What you are buying? You are buying a company. This is not like the Putnam situation, where you had Marsh & McLennan, a large insurance concern that had all sorts of businesses, and one of the businesses happened to have been a business that ran mutual funds.

JCG stated over and over again that this business accounted for most of its revenues. Your fortunes were going to rise and fall with this business.

If you go on to the next page of the 8-K, there are a few bullet points of remedial measures that JCG is announcing are being undertaken to remedy the issues identified by Attorney General Spitzer, followed by a quote, again from Mr. Whiston: Our business is built on trust and I have personally apologized for any concerns we've caused our investors.

Again, why would JCG's investors be concerned? They'd be concerned because the public filings of JCG made it very **[Page 10]** clear, when you're buying JCG stock, this is the business you're buying, which is why the complaint was able to plead the stock market reaction, the efficient market reaction to the disclosure of this misconduct. Clearly, it made JCG a less valuable investment to its investors.

Whiston continued: Our management team holds itself accountable. All right. Holds itself ac-

countable, he says. And the point of the matter is that this was clearly material to JCG. And a dismissal here on the theory that JCG didn't make any statements would really mean that JCG on some level has committed the perfect crime. Because if you look back again at Your Honor's decision in In Re: Mutual Funds, in In Re: Mutual Funds, Your Honor had found, when talking about the scheme, that the centrality of the fund defendants activities, and fund defendants is a term that Your Honor defined in, I believe it was the first footnote of the opinion --

THE COURT: Whichever. It would encompass JCG.

MR. PRESS: It would encompass JCG and JCM. That the centrality of the fund defendants to the alleged scheme is self-evident. The Court then went on to discuss, you know, the trader defendants and a few others who were more peripheral. But the centrality of the fund defendants, including JCG and JCM, to the scheme was self-evident.

And the Court added, this is at Page 863 --

THE COURT: Well, how's this a perfect crime? If I'm **[Page 11]** correct that they're liable to the mutual fund investors, they are facing liability?

MR. PRESS: The funds themselves, which is the point that the defendants are now making in their Motion to Dismiss, is the prospectuses, that wasn't the work of JCG, that wasn't the work of JCM.

THE COURT: No. No. No. I'm only asking you a question in response to your point, your allegation that, under the reasoning, they committed the perfect crime. There may be other reasons that the mo-

tion ought to be denied. I don't quite understand that.

If I am correct that JCG is liable to the mutual fund investors, they are being held accountable to someone for their alleged misdeeds, which means that they didn't commit a perfect crime. I take it a perfect crime means they committed the crime without being held accountable to anybody for it. And we also have the SEC and the attorney general of New York. But put that aside. But even in the context of this litigation.

MR. PRESS: And here they've committed a crime against the investors in JCG stock, a crime --

THE COURT: That's a different question.

MR. PRESS: -- against the investors in JCG stock. And what we're being told is they are not liable to the investors in JCG stock because even though they said up and down, they being JCG, said up and down in their public filings the fortunes of, **[Page 12]** the fortunes of JCG are going to rise and fall with the funds, what we are being told by the defendants now is that the actual prospectuses, those were issued by the funds themselves, funds that all their operations are actually being handled by JCM.

Now, this Court also found in the fund investor action that the funds themselves have no liability because they were just shells and they had no operations. So what defendants are saying are if there's a misrepresentation in the prospectus, and that would give rise to any liability to JCG investors, well, the people who made that misrepresentation are the funds.

This Court already found that the funds had no liability to the fund investors because they didn't do

anything. They were just holding, holding the money. And it was actually the JCG and JCM whose centrality to the scheme there was beyond dispute.

And I believe that if their centrality to a scheme to defraud fund investors is beyond dispute, in this particular instance it is inevitable and unavoidable that that same conduct would injure investors in JCG when I say "inevitable and unavoidable", you need look no further that JCG's own SEC filings, JCG own 10-K, where it says a copy of JCG's 10-K is annexed in its entirety as Exhibit A to defendants' motion papers, their Memorandum to Dismiss the Second Amended Complaint.

And they're very clear. The risk factors discussion. Risk factors were a decrease in assets under management in the **[Page 13]** funds is going to harm JCG. If fund investors want, suddenly are dissatisfied, they want to redeem their investments, that's going to cause harm.

That is heavily regulated environment. And in this heavily regulated environment, we might be subject to regulatory proceedings. And if that happens, that can have a material adverse impact.

I think that time and time again, they were telling the market, if you want to get a handle on JCG as an investment and JCG's viability as an investment, look at how the funds are doing. That's what you look at. You look at how the funds are doing. If the funds are doing really well, and there was a 10-K that was attached, I think, in small part to one of the prior motion filings, one of the earlier JCG, one of the earlier JCG 10-K's when the company was doing a little better, they attributed the success to the success of their initiatives in marketing the fund when they weren't doing as well, they said it's because of

decreases in amounts under management and assets under management.

Like I say, there were warnings of the possibility of regulatory proceedings. And separate and apart from anything else, those warnings themselves being made by JCG at times when JCG's officers knew of the misconduct, those warnings themselves are probably misleading. They gave rise to a duty to disclose.

There are cases that we had cited to Your Honor, such **[Page 14]** as the Craftmatic case, among others, where if a company talks about its business in public filings, that will give rise to a duty to disclose knowing misconduct that's occurring in the business.

So JCG's own SEC filings were also misleading. But getting back to JCG's liability for the, for the fund prospectuses.

There is the same scheme to defraud. I submit, Your Honor, that it cannot be said as a matter of law that investors in the JCG stock state no claim arising out of this pervasive scheme to defraud when by JCG's own admissions in its SEC filings an inevitable result of the scheme being exposed is going to be devaluation of JCG stock. That's what they said.

In one of the 10-K filings, and this was only attached, there was a small excerpt attached as Exhibit B to defendant's first Motion to Dismiss. This is the 10-K for the period ending December 31, 2000. Elsewhere in the 10-K for JCG's predecessor, actually, it says, while management is required to devote substantial time and effort in regulatory compliance issues, we do not foresee that such compliance under present statutes will impair our competitive ability or result in any material affect on results of opera-

tions. They say this at a time when they're sitting on this time bomb that Attorney General Spitzer ultimately exposed.

We also have, and this is just with respect to JCG, we **[Page 15]** have the fact, and I think I pointed this out to Your Honor in the briefing, that it's not merely dissemination, it's not merely a logo, although those are factors. You have, I believe if you look at the case law, there are not case, there are no cases that hold dissemination of a knowingly false statement or knowingly misleading statement does not give rise to liability because you are putting the statements in front of the investors. And think we had cited some case law on the dissemination point. I'll get back to that momentarily.

But it's not just dissemination. It's not just the overlap in the logo, the fact that JCG and the Janus funds documents have the same logo. It's not just that JCG issues 10-K filings -- 8-K filings after there are regulatory actions brought on account of the mutual fund misconduct, apologizing to its shareholders for the lack of trust that this might have engendered. It's also just a fundamental policy of JCG.

If you look at JCG's 10-K again. Under Business and Distribution Strategy, this is Page 3 of the 10-K. Janus's business strategy comprises the complimentary asset management firms that collectively make up Janus, and the fact that these firms and the products they manage are branded and distributed through one global distribution network. In other words, it's fundamental, business strategy of Janus to hold itself out to the outside world, branded and distributed under one global distribution network.

[Page 16]

And the overlap isn't just how they hold themselves out to the outside world. I believe in our prior papers we pointed out that JCG and JCM's officers overlapped entirely.

I also want to hand up something else to the court. This is just a couple of pages from a document that the defendants had previously annexed to their most recent Motion to Dismiss. And this was Exhibit C to defendant's most recent Motion to Dismiss. This is just an excerpt from that exhibit. It was a sixty-some odd page long document. And what I have for Your Honor is a smaller subset of that.

But if you look at this document, this was part of one of these documents submitted by the funds themselves in order to show, supposed to demonstrate to the Court that the funds were separate entities from JCG and JCM. If you look on this document at Pages 62 through 65, there is a listing of all of the officers of the funds. These are the officers of the funds. 17 people named. Every single one of these 17 people, if you look in the far right column, is listed as a Vice President of Janus Capital. Every single one of the people.

So the scheme that you have, and I think Your Honor had correctly identified it as a scheme in the In Re: Mutual Fund opinion, is a scheme where it is a fundamental business practice of JCG and its subsidiaries to act together. It's the same people, the same employees who are distributing the mutual fund prospectuses, who are issuing the mutual fund prospectuses. And **[Page 17]** JCG, when it puts on its publicly-traded company hat, makes it very clear that your success or failure depends on how the mutual funds do.

I think under those circumstances, again, to find that the funds have no liability because they didn't do anything, but those who actually did something have no liability because they weren't the funds, it leaves investors who lost a tremendous amount of investor capital, I think we identified in the complaint, the stock price predictably fell, I think it was about four dollars a share when this news hit.

THE COURT: I was just telling my law clerk about that. I can't quite articulate this right. But that does raise an interestingly causation issue. I'm inclined to think that in all probability the stock price fell a lot more because of the adverse publicity from the attorney general investigation than the share prices would have been had people known all along that there was market timing going on.

As I say, that is certainly not a dispositive issue on this motion. But factually, it just occurred to me that my guess is the way the stock market reacts, it probably declined because, in large part, I mean, substantial part, because of the adverse publicity, which I understand was caused by the fact that the activity had theretofore been concealed.

But if you're really looking at what was the damage caused by the making of the false statement, one could say it all **[Page 18]** was because there wouldn't be any negative publicity but for the fact that the concealment had occurred. I guess what I'm saying is if everybody had known all along that there had been some market timing in the Janus shares, I'm inclined to think that the, in an efficient market might have, maybe less people would have put their funds into the Janus mutual funds, causing the Janus parent stock to be a little less.

I suspect there wouldn't have been a one-to-one correlation to what happened after the announcement.

MR. PRESS: Your Honor, I would respond twofold. First of all, I think that -

THE COURT: I'm not suggesting in any way that's dispositive today. I'm not suggesting it's dispositive at all because there still is a causal connection.

MR. PRESS: First of all, a claim does not get dismissed on loss causation grounds merely because, at least at the pleading stage, we haven't determined yet how much of the drop is related.

THE COURT: I agree with you.

MR. PRESS: And this is certainly a fact question. Even when Your Honor said that Your Honor suspected that the decline would not have been so great had people known all along, that's the kicker. Had people known all along. They hadn't known all along. And as the Court and others have correctly identified when discussing market timing, market timing is not **[Page 19]** inherently improper. It was the concealment of the market timing that made it improper. And the concealment made it improper because clearly the anti-market timing measures that Janus supposedly had implemented were there to induce certain types of investors. And those investors must have considered it material. Again, certainly the contrary cannot be determined as a matter of law.

THE COURT: Let me ask you one thing because, frankly, I'll confess my own lack of preparation in some respect. I'll ask Mr. Perry about this more.

To the extent that you're relying upon statements in the 8-F after, that really had not been what I understood your theory to have been. It seems to me that changed totally the analysis. Then you have to point out what in the 8-F's was, was false and misleading, how that affected the market. I had not really, again, understood that to be the focus of the briefing.

MR. PRESS: And I apologize for that. That had not been the focus of the briefing on anybody's side. But I believe the fact of the matter is there are several --

THE COURT: So you want to file a third amended complaint?

MR. PRESS: I'm sure if I suggested that, Mr. Perry would be up out of his seat in a minute.

THE COURT: But no, no. Exactly the point. He would be up out of his seat. So the question is why should I consider **[Page 20]** that argument when it's not even pled, when the claim isn't even pled?

MR. PRESS: I would say this, Your Honor, as far as the argument not having been pled. If you look at the history of the pleadings in this case, we pled a complaint. There was a Motion to Dismiss filed on several different grounds. And the Court issued a ruling last year on very, very narrow grounds. I have a copy of it. Issued a ruling that only addressed the pleading of loss causation and dismissed the action without prejudice because the class was defined as everybody who bought --

THE COURT: I remember. I remember. I was dancing a little. But I think it was true. But it was --

MR. PRESS: And in response, Your Honor, we amended the pleading. And our amendment was very narrow. We submitted a red line version to show the only thing we changed on the amended pleading was the definition of the class.

THE COURT: But that doesn't justify -- well, I'll hear from Mr. Perry. But you've confirmed that there hadn't been, that the alleged, any claim based upon alleged misstatements in the 8-F has not been the focus of either the briefing or the second amended complaint.

MR. PRESS: It had not been, Your Honor. I certainly have no focus for the second amended complaint, again, for the reasons we just stated, that we amended for the narrow purposes of --

[Page 21]

THE COURT: Okay. Well, then it hadn't been the subject of the first amended complaint, I mean the first complaint.

MR. PRESS: This Court has found, and several other courts have found as well, this Court held in the In Re: Mutual Fund action, primary liability can apply to any person who substantially participates in a manipulative or deceptive scheme even if a material misstatement by another person creates the nexus between the scheme and the securities market.

You know, we get back again to the fact that at least as far as the misrepresentations in the prospectuses were concerned, this Court previously found claims were stated against JCG and JCM but not against the funds themselves, which brings me to JCM -- not against the fund themselves, which

brings me to JCM and this Court's dismissal of the claims against JCM.

And JCM is in a somewhat interesting position here in that, besides this Court having found that a claim was state, pled against JCM for misrepresentations or being part of a scheme, the SEC issued a Cease and Desist order. And we had annexed copies of that Cease and Desist order to our papers. And the SEC Cease and Desist order was a Cease and Desist order which stated that JCM made an untrue statement of material fact in a registration statement, and also that it filed several registration statements containing prospectuses that falsely stated or otherwise represented.

[Page 22]

So when we get to JCM, there doesn't seem to be much of a question at this point that JCM made a statement. The SEC Cease and Desist order, and even if you look at this Court's prior opinion. JCM has definitely made a statement and it stands to reason, because the prospectuses themselves for the funds had said, and this was the reason behind the court's dismissal of the funds from the In Re: Mutual Fund action, the funds don't perform any operations. All of that is handled by JCM.

Now, Your Honor had said that JCM should not incur liability, I think the basis of the Court's ruling in the Fischbein matter, that was the Putnam, Marsh and McLennan matter, whether or not JCM actually made a statement because the subsidiary had no duty to the investors in the parent. And would submit, Your Honor, that -

THE COURT: Has Fischbein know?

MR. PRESS: I'm sorry? Was it on appeal?

THE COURT: Is Fischbein on appeal?

MR. PERRY: There was no appeal, Your Honor. It is my understanding the time has now run.

THE COURT: I was hoping to get some guidance.

MR. PRESS: I would submit, Your Honor, that Fischbein is very, very different from this case on really several grounds. First of all, there were no allegations, and I think actually there were, there was no evidence of Marsh and McLennan issuing **[Page 23]** SEC filing after SEC filing, saying that our fortunes will rise and fall based on how the Putnam mutual funds do.

Putnam did not account for a majority of Marsh and McLennan's business. Not all of the Putnam officers were officers of Marsh and McLennan. As a matter of fact, as I recall from the Court's opinion, there was only one overlap in officers and the Court had found that that person had concealed the misconduct at Putnam from the other people at Marsh and McLennan.

And therefore, it's not surprising that if you looked at the stock price reaction of Marsh and McLennan stock, there really wasn't much, if any, of a reaction to this because Marsh and McLennan had not held itself out as being, the Putnam funds as being the end all and be all of Marsh and McLennan.

Marsh and McLennan did not issue a statement saying that its business strategy was to hold themselves out to the entire world, Marsh and McLennan and the Putnam funds all as one entity with one distribution channel.

The disclosures here, and the situation here, I think is more akin to the Semerenko case or the Zelman case. There were a few others. Masnik, Muzinich. What all of those cases had in common, and those were all discussed in the briefs and the subsequent letter briefing, what all of those cases had in common were shareholders in the securities of a particular company were entitled to maintain 10(b)(5) actions against a completely different company for misrepresentations by that completely **[Page 24]** different company that were not directed to the plaintiffs. And it all came down to issues of foreseeability and materiality.

Semerenko, as this Court is well aware, is cendant misrepresenting its financial statements. And that gives rise to a claim by investors in a company called ABI.

The Zelman case was a case where JDS Uniphase made misrepresentations about its business. And that gave rise to investors in some securities issued by UBS.

Masnik was a case where Smith Kline had made representations -- actually, I'm sorry -- Bolar Pharmaceuticals had made representations about its success in getting approval for a particular drug. That gave rise to a claim on behalf of investors in Smith Kline stock.

And the Muzinich opinion, which was a slip opinion that we had annexed to several of our papers, was Raytheon making misrepresentations about a Raytheon business division that gave rise to a claim by investors in a company called Washington Group.

What all of those cases had in common was through other statements or actions the misrepre-

sentations or the subject of the misrepresentations was presented as being something that was going to have a material impact on the plaintiffs' investments. And we have that situation here. And we did not have it in Putnam.

Here we have numerous SEC filings, risk disclosures, **[Page 25]** and other filings describing the business and describing the risks to business of JCG that make it very clear that anything that happens with the Janus funds is going to be material to JCG. And therefore, I believe those SEC filings do create a duty on the part of JCM. What JCG says if JCM gets in trouble, we're going to be in trouble, when JCG feels compelled to apologize, when JCM gets in trouble, when JCG says, if JCM's done well, we've done well, that gives rise to a duty.

And also, and therefore I feel that the dismissal of the claims against Putnam in the Marsh and McLennan action, in Fischbein, do not compel dismissing claims against JCM, which clearly made a statement, clearly acted with scienter, clearly played a role that was central in the fraudulent schemes, especially, and this is something like I said before, we did not have in the Marsh and McLennan situation, the officers of JCM and JCG overlapped. And not only that, but there was an overlap with the officers in the funds themselves. It was all that same core group of people. They were all Janus Capital people.

And on top of that, I would submit, regardless of whether or not I persuaded the Court in my discussion of potential liability that JCG might have otherwise, the complaint clearly does plead that JCG is a control person of JCM, so that in the event that JCM is found to have a duty and therefore have li-

ability for the statements, the misrepresentations that it undoubtedly made and undoubtedly made knowing full well that it **[Page 26]** was going to impact JCG because the JCG and JCM people were the same people, the JCG SEC filings weren't warned of that, well, in that event JCG has liability as a control person of JCM. It's something we've pled. And there is no question in my mind, anyway, and I believe it's certainly contrary, cannot be determined as a matter of law, that JCG controlled JCM.

And I know that the Court has articulated concern both today and previously of, you know, what would be the ramifications --

THE COURT: There's no ramifications if I don't find that JCM is liable.

MR. PRESS: Agreed, Your Honor. Agreed.

THE COURT: And I'll hear from Mr. Perry. On the other hand, if I find that JCM is potentially liable, then it would seem to me there be control person liability. I would have to hear from Mr. Perry why that wouldn't be so. But it is a premise that, in my tentative views, I questioned because, as I say, based upon Fischbein and the fact, in my judgment, there is no duty, and none of the things that you have said seems to create a duty.

I mean, the mere fact that there are overlapping directors and things of that nature doesn't seem to me to change the duty analysis. I could be wrong on the duty.

MR. PRESS: It's not merely the overlapping directors. It's also when you've got overlapping officers and when JCG's SEC **[Page 27]** filings make it very clear, JCG's fortunes are going to rise and fall with what JCG does.

THE COURT: I think the more I hear you, the more I think that this would be an unwise case in which to take on Carter-Wallace. Everything you say upon that. Because the revenues of JCG are so tied to the performance of the funds, it would seem to me that even if Carter-Wallace should be reined in, I'm not sure that this is the case it should be done in.

MR. PRESS: I submit --

THE COURT: For the reasons you persuasively stated.

MR. PRESS: I submit, Your Honor, that Carter-Wallace should not be reined in because Carter-Wallace is not alone. The other cases that I mentioned earlier also --

THE COURT: No. No. I understand that. But there's a part of me that, maybe politically conservative, conservative intellectual approach, it seems to me that you are, I mean Carter-Wallace itself raises the issue. I understand there were potential, there were potential, it was a regulated, clearly, the distribution of the drugs were regulated. Clearly, they were potential plaintiffs. If, in fact, people died as a result of the drug, it seems to me something is a little bit chaotic.

It doesn't go with my orderly mind when you have statements being made in one context which themselves, you know, which themselves give rise to potential civil liability, regulatory liability, to say, that same set of circumstances also [**Page 28**] causes a securities violation when, because of the efficient market theory, yes, I understand that what's material may affect the value of the securities. But is that really what Congress had in mind when it enacted the securities statute?

But it's a quandary. It puzzles me. As much as I am puzzled, I have not been able to come up with a dividing line on the point. As I say, maybe there's a case where that dividing line could come. From what you said, unless Mr. Perry convinces me I'm wrong, this is not the case in which to draw it because there clearly is absolutely no question of a direct relationship between the revenues of JCG and of the fund, and of the investments in the fund.

MR. PRESS: And Your Honor, I believe that that's really just the logical outgrowth and the logical question --

THE COURT: But it does complete materiality in-connection-with. You would agree with that? In effect, any material statement in any market, any material statement that somebody could come in and say, a financial analyst could say, well, yes, that was material when made in that context, it's also that was material in affecting the price of the stock. Virtually materiality and in-connection-with become conflated, do they not?

MR. PRESS: There is some conflation, Your Honor, under Basic because the whole premise of Basic v. Levinson is that the efficient market is a market that searches out and incorporates, you know, searches out, considers and whose price incorporates [**Page 29**] all material information. And while I submit that as with any legal principle there is a risk at a certain point of a sort of slippery slope, I do not believe this is the case that presents any sort of slippery slope risk because it's not some analyst somewhere saying this was material. It's JCG in it's SEC filings saying over and over again, this is material.

You know, you have to look no further than JCG. Look at defendant's first brief, which I read a long time ago.

THE COURT: No. No. No. I take your point. Let me come back to a question I asked before. I don't know what the market performance was. But if they had chosen to bring it, assuming that there had been, after the government announces its antitrust case against Microsoft, could Microsoft investors have sued Microsoft for securities violations because their failure to disclose their antitrust violations made the stock artificially high?

MR. PRESS: There have been -- well, I am not familiar enough with the facts of Microsoft, clearly not as familiar as Your Honor is.

THE COURT: I have no knowledge about this.

MR. PRESS: But in fact in Microsoft, what I can tell Your Honor, though, is, there have been --

THE COURT: Not a bad idea. That MDL is running down. Maybe I can keep it going by suggesting a new theory.

MR. PRESS: I believe that Microsoft stock has **[Page 30]** generally been performing well, which is what might have been going through --

THE COURT: No. The question is what happened at the time the government announced its antitrust action.

MR. PRESS: And the answer to your question, while don't know the particular facts of Microsoft, I do know that there have been many instances where announcement of findings of antitrust liability against a company have given rise to securities claims by investors in that company stock, and

courts have upheld pleadings. And the Sotheby's case was one example. There was a case, Pinker v. Roche Holdings, was another example. I believe Menkes versus --

THE COURT: You're right.

MR. PRESS: There have been -- and the list goes on. There have been several other cases where, depending on what the company said and did, an announcement of antitrust liability or an announcement of antitrust claims has been found to give rise to a validly stated claim for securities fraud by investors. And it's not just antitrust.

And I believe that this Court shouldn't be thrown off the trail with respect to Janus just because they're in the business of selling mutual fund shares.

THE COURT: No. You've made that point. All the more, a fortiori if you're a tire manufacturer --

MR. PRESS: Exactly. Exactly, Your Honor. And in the **[Page 31]** efficient market, you look at the company's business. And any news that's material regarding the company's business is something that the efficient market considers. And therefore, if representations concerning the company's business that were made publicly are found to have been false or misleading or materially incomplete and the market reacts by, the efficient market price declines when that news comes out, I believe there is liability.

If I may address one other concern that the Court had articulated. And that was the concern that if the Court were to let this case proceed only to be, to find out later on in the litigation or for the Fourth Circuit to rule that you really don't have a sufficient connection between the JCG investors and all of this misconduct by JCG and JCM, you know,

forgot what the Court said, but, not admitted, the self-evident participation in a scheme to defraud arising out of the market timing, the concern was we will have spent all this time, effort, energy and resources only to be back at square one and not having, you know, not having a viable claim.

And I would submit, Your Honor, that in the first instance that's a concern that I suppose exists in every Motion to Dismiss situation. But in this particular instance, it's less of a concern than it ordinarily would be. And it's less of a concern than it ordinarily would be because whether this case goes forward or doesn't, there are going to be proceedings and discovery and depositions and documents and all of that relating **[Page 32]** to the conduct of JCG and JCM.

THE COURT: Maybe so, maybe not. Depends upon the adequacy of the SEC settlements, according to Mr. Perry. But understand your point.

MR. PRESS: Yes. But the point is here these proceedings by and large --

THE COURT: I understand. I understand.

MR. PRESS: They're going --

THE COURT: But this is a different universe of plaintiffs.

MR. PRESS: It's a different group of plaintiffs whose damages are going to be calculated differently and whose questions concerning damages and causation are going to be decided and analyzed differently. But questions concerning scienter are going to arise out of the same conduct by the same people. And these are the same people who were at JCG and JCM and who were at the funds themselves.

And what it really boils down to, Your Honor, is you have an enterprise that, according to its SEC filings, holds itself out to the public as one. It's a fundamental business policy according to Page Three of the SEC filings, that everything is branded and distributed through one global network. That's a fundamental business policy.

In furtherance of that, you have a situation where JCG said over and over again, whatever happens to the funds, whatever **[Page 33]** happens with JCM, that's material to us. Not surprisingly, when the negativity was exposed here, when the truth was exposed, of course the market reacted the way it did and investors were harmed. And I would submit that one cannot say as a matter of law under these circumstances that JCM has no liability to the JCG investors and JCG has no liability to the JCG investors either in its capacity as a control person or in the manner in which it participated in this fraudulent scheme.

THE COURT: Thank you, Mr. Press. And whatever I do with this motion, I'm glad to have heard from you. You made me quite comfortable that I properly held in JCG and JCM in the investors case. Thank you at least for giving me a comfort level. I sill have to decide these issues, but let me hear from Mr. Perry.

MR. PERRY: Thank you, Your Honor. May it please the Court. Address briefly the arguments Mr. Press made in roughly the order he made them and then turn to the in-connection-with question Your Honor left us with.

First, this is not and has never been a case about scheme liability. It was not pleaded as a scheme case. It was not briefed as a scheme case.

THE COURT: According to Mr. Press it was. What were the paragraphs?

MR. PERRY: Your Honor, Paragraphs 128 through 130, which appear in the first claim for relief, not in the charging **[Page 34]** allegations of the paragraph. And they merely recite the language of the rule. They have no factual allegations.

Judge Blake held in the Royal Ahold case correctly that the PSLRA and Rule 9(b) applied to scheme cases and required pleading with specificity all the facts, as the Fourth Circuit has recently emphasized in the Hunter case, all the facts that relate to the scheme.

We said in our reply brief, Your Honor, at Page Five, Note Two, defendant, or plaintiff has never pleaded a case of scheme liability. Ever. They filed at least three letters since then. We've heard nothing about scheme liability until they got here. Nothing in this complaint puts us on notice of scheme liability. Particularly, Your Honor, in the wake of the Janus fund investor case, which did speak of scheme liability, that issue was no mystery to anybody, they didn't amend the complaint to allege scheme liability. There is no scheme liability question in this case.

What did they plead? They pleaded a case of affirmative misrepresentations. This appears from the very beginning of the second amended complaint, Your Honor, Paragraph Six. Their theory of the case is that the defendants caused mutual fund prospectuses, mutual fund prospectuses, to be issued for Janus mutual funds which created the misleading impression that Janus would implement measures to curb market timing.

That is their case, that the mutual fund prospectuses **[Page 35]** contained affirmative misstatements.

Your Honor, we have attacked that complaint, that theory of the case as deficient to 12(b)(6) motion. It tests the allegations in the complaint.

I found it curious that Mr. Press quoted only the three paragraphs in the complaint that have nothing do with the case during his hour of argument, and in fact started handing up documents that have never been previously even mentioned in support of those allegations.

The complaint should stand as it reads. To get to the part where I get to jump out of my chair, absolutely there should be no third amended complaint. This case was filed or the Spitzer complaint was filed on September 3rd of 2003.

THE COURT: You don't have to persuade me of that. There are not going to be any more amendments.

MR. PERRY: Thank you, Your Honor. I will move along from there.

THE COURT: And you agree that there's nothing about the 8-F statements in the existing?

MR. PERRY: That's correct, Your Honor. The public filings say what they say but they really have nothing to do, certainly the post September 3rd public statements have nothing to do with the pleading in this case. So what is the pleading in this case and how does it relate to the fund investor question?

The fund investor case was, is, always has been an **[Page 36]** omissions case. This Court said, and I'll quote from the fund investor opinion: "The

gravamen of plaintiff's claim is not for specific misrepresentations but for the fund's failure to disclose that they were permitting favored customers to engage in market timing."

THE COURT: My recollection, I had to get away from In Re: Ute somehow. Wasn't it that context?

MR. PERRY: You actually had to get into the Affiliated Ute presumption, Your Honor, which applies only to cases primarily involving omissions. And therefore --

THE COURT: In fact, I thought it was the truth. I'm mocking myself. But it was in that context.

MR. PERRY: And the reliance on Affiliated Ute is critical, Your Honor, because it shows that that was an omissions case.

And I would like to try a thought experiment, if could, because I think under the rationale of the Court's opinion there, and as we've said, we don't entirely agree with it but we can set that aside, I hope, for today. Your Honor, if the prospectuses, the fund's prospectuses had been entirely silent on the question of market timing, but the adviser allowed certain investors to time without affirmatively disclosing that fact to other investors, to Mom and Pop in Baltimore, to use the Court's phrase, I think the rationale of the Court's fund investor opinion would lead to exactly the same ruling at the Motion to **[Page 37]** Dismiss stage and an omissions case as the Court's opinion that actually issued.

In fact, I don't just think that, I know that because the MFS fund's prospectuses were silent on market timing and the Court applied its Janus ruling to MFS. So that the fund investor opinion does

not depend on affirmative misrepresentations in the fund prospectuses.

Lead plaintiff's complaint in this case, by contrast, absolutely depends on those misstatements because if there were no misstatements made by my clients, Janus Capital Management and Janus Capital Group, there can be no 10(b)(5) liability. So allow me to turn, if I could, to that question. And this is the question of the perfect crime.

There are three companies at issue in this case, Your Honor -- Janus Capital Group, Inc., the publicly-traded holding company, diversified financial services company. Might not be quite as diversified as Marsh and McLennan. We'll get to the relevance of that in a minute. But it is a diversified financial services company. It owns a number of operating subsidiaries that do the transfer agent function and the broker/dealer function and the investment advisory function. For a while they had a recordkeeping function and a bunch of other things, all under the umbrella of the publicly-traded holding company.

Those securities, the equity stock of JCG, are the only securities that this plaintiff ever bought or sold.

[Page 38]

Second company, Janus Capital Management, LLC. Privately-held operating subsidiary of JCG. Federally registered investment adviser under the 40, the Investment Advisers Act of 1940. Its job is to manage the Janus mutual funds.

Third company, Janus Investment Fund. Not actually a company. It's a Massachusetts business trust, which is a form of corporate organization used for mutual funds, because of some quirks in the 1940 Investment Company Act that makes it useful and

convenient to set up mutual funds as Massachusetts business trust. Separate company. No ownership interest runs between Janus Capital Group or Janus Capital Management to Janus Investment Fund, which we call JIF. Separate company. It's owned entirely by the mutual fund investors. It's a trust. All of its assets are held in trust for those investors.

The only relationship between my clients, the defendants, and JIF is a contract, an investment advisory contract that runs between JCM and JIF by which JCM agrees contractually to provide certain services to the trust. The trust is separately run. It has a Board of Trustees, all but one of whom are entirely independent from Janus and are paid by the trust. It has separate counsel. It has separate books and records. And most importantly for this case, it has separate securities.

The mutual fund shares are issued by the trust. The trust is the registrant. Again, to come back to the fund **[Page 39]** investor case, the Court recognized in Footnote Two the JIF and the other one, Janus Advisory Series, as registrants filed allegedly deceptive forms with the SEC, including the misleading prospectuses and issued the actual mutual fund shares.

This plaintiff has never purchased or sold any security issued by JIF pursuant to those prospectuses. Those prospectuses are prepared by JIF, filed by JIF. JIF is subject to liability.

The statement of additional information, which is incorporated in the prospectus, is very clear on this. Lead plaintiff has never answered that point, Your Honor. The cost of preparing, printing and mailing the fund's prospectuses and SAI to current shareholders and other costs of complying with ap-

plicable laws regulating the sale of fund shares are all borne by the funds themselves. Those are the fund's functions -- registering their shares for sale, selling them to the public.

Janus entities have some involvement with those. Janus distributors, not a party to this case, the broker/dealer, sells some of those shares.

Janus Capital Management, the investment adviser, provides certain services, recordkeeping, accounting, legal and other, in connection with those. But the securities are offered and sold by the funds, by the trust. They are not Janus Capital Group securities.

Where does that all get us? The statements in the prospectus, the affirmative misstatement on which this plaintiff **[Page 40]** hangs its case, the statement that the funds will implement policies to deter market timing, are the fund's statements. They are made by the fund.

The Court determined in the fund investor case that those statements made by a separate company to a separate group of investors were rendered or could have been rendered misleading by the advisor's actions in accepting timing trades in violation of those policies. That's why the Court said the funds were in some sense the victim of the alleged misconduct.

We think the analysis slipped, by the way, in that the duty runs through the contract to the trust and the trustees, not to the individual investors. That's our point of disagreement. But for this case, that's neither here nor there.

That omission is actionable on behalf of the fund investors against the adviser only if there's a duty

that runs to them. This Court held that there was, that it was a fiduciary duty. We'll leave that aside for now.

In this case, then, the question is whether a similar duty ran upstream from the adviser, through the holding company, out to the public shareholders. The Court held in Putnam that it does not. That was a correct holding a year ago, a year and a week. That was March 1st of 2006. In the 53 weeks since then, the Fourth Circuit has issued no contrary decision. No other court of appeals has entered any contrary decision.

In fact, Your Honor, it's fascinating, in the 67 years **[Page 41]** since the Investment Company Act of 1940 was enacted, no published decision in America that I can find, and I have pretty good research help at my firm, has ever held the investment adviser to a mutual fund liable to the public shareholders of it or its holding company. Ever.

If the duty that Mr. Press postulates as a necessary predicate to this case were so obvious, some other case would have come along. It hasn't. It hasn't even in the context of the mutual fund MDL. And the reason for that is because these are separate companies.

JCM didn't make the misstatements. Even if it had, didn't owe a duty to mutual fund investors.

JCG, then, the holding company, the parent company, it has a duty to its shareholders, undoubtedly. But it did not make the misstatements. It's one step removed from the prospectuses, from JCM. In fact, the complaint contains no allegation running to JCG that it made, prepared, participated in, involved itself in, or even read the statements in the fund's

prospectuses, the separate company that issued separate prospectuses.

There simply is no juridical link between those two things. Whether you view it, Your Honor, through the lens of making a misstatement, and I find that lens particularly helpful in light of the Fourth Circuit's recent Hunter decision that says the plaintiff must plead all facts and we will not look outside the complaint to determine whether it made the misstatement **[Page 42]** element is met, or look at it as in-connection-with, which I'll return to later, there simply is a disconnect between the action of the ultimate parent company and the statements made by separate companies.

And now to return once again to the fund investor case, why that matters. It's because JCG cannot be actionable for an omission if it didn't make the statement in the first place. And because the duty, there's a separation of the duty by the corporate form. Your Honor --

THE COURT: There is a line of cases which, they may all be underwriter cases, but it indicates the dissemination of the misleading statements with knowledge does give rise to liability. Is there not?

MR. PERRY: Your Honor, they are generally underwriter cases. They usually have Section 11 claims under the 33 Act, which makes the underwriter liability for misstatements in the registration statement. So the 10(b)(5) claim, in my view, just sometimes gets picked up and carried along with the 33 Act claim. Here the underwriter hasn't been sued. There's no 33 Act claim.

Also, my understanding of those cases is that they are not saying that passing along a document

that you know is false is sufficient to create liability. If that's what they said, they'd be dead wrong because the statute and the rule prohibit the making of a misstatement.

The rule of those cases is that a party may be so **[Page 43]** substantially involved through its obligations as underwriter, as underwriter's counsel or accountant, in the preparation of materials that go into those statements, that if it did not actually pen the line, it nevertheless was sufficiently involved to be considered having made the statement in some broader sense.

There's a debate about the scope of that rule out in the courts. And in the Enron case, for example, there's a disagreement between the SEC and the private parties as to the scope of that rule. That goes to the limits of aider and abetter liability under Central Bank.

And I think it is implicated in this case in the sense that certainly one of the things that this plaintiff is trying to do is hold my clients liable for statements made by a separate company. But those cases don't say that the mere involvement in the sense of making the prospectus available through a web site or having hosted some of the officers of the separate company in your office suite makes one a disseminator in the sense that you've adopted and become the maker of all those statements. Those cases don't go that far.

And I don't think under the language of the statute or the Fourth Circuit's law they could because, again, to come back to the rule, it is unlawful to make any untrue statement of a material fact. And here, the allegations simply don't get the Court to the JCG level to have made the statements.

JCM, Your Honor, the plaintiff today, says, well, JCM **[Page 44]** must have made the statements because the SEC's consent order says that it filed the registration statements. One, the consent order is not binding in this court or the parties. And there's a footnote in there that says that. Two, we don't dispute that JCM did the physical act of mailing the trust registration statement. That's one of the clerical recordkeeping services that the adviser provides to the mutual funds. Doesn't make JCM the maker of the statements. And third, the SEC was proceeding under an aiding and abetting theory, a theory that's available to the SEC that's not available to these private plaintiffs.

The plaintiffs come back and then say, well, wait a minute, what about Semerenko and all these other cases? And here this shifts over a little bit in the in-connection-with issue. In every one of those cases, the maker of the statement owed a duty to the shareholders that received it.

Semerenko itself was a tender offer. The choir lied, allegedly lied about the value of its shares. And in reliance on that lie, people bought shares in the target. That's not too difficult to link up the lie and the reliance, the action in reliance by the other investors.

It's a far try from this case where the alleged misstatement is made by JIF, separate company, to a separate group of investors. The plaintiffs then two companies over and out in a separate company of investors, whether they relied on it. The duty doesn't run the same way and the relationship isn't **[Page 45]** as close.

The other cases are similarly different. Muzinich, the misstatements were made about the value

of a Raytheon business unit that was being sold to the acquirer and persons invested in the acquirer in reliance on those misstatements. It's just like Semerenko, the duty ran did not misrepresent the value of the assets being either acquired or sold. And the other cases are the same. Our case is fundamentally different.

To answer the Court's question or to attempt to answer the Court's question about in-connection-with in Carter-Wallace, Carter-Wallace involves statements made by a public company issuer to a separate group of listeners. And the Court held that if the plaintiffs could prove that those statements were nevertheless relied on by the investing listeners, that is the market professionals, the in-connection-with requirement could be met.

In this case, the statement was not made by the public company issuer. The statement was made by JIF. It was allegedly made misleading by the actions of JCM, not JCG. And there is a fundamental disconnect between when an issuer makes a statement to a different audience and when two separate companies make a statement.

I offer for the Court's consideration --

THE COURT: Well, I agree with that. And I think that, I think I agree with that although I sometimes confuse myself.

[Page 46]

The Carter-Wallace issue becomes dispositive only if I find that there are sufficient allegations that JCG made the statements.

MR. PERRY: Correct, Your Honor. Sorry. Changing gears, Your Honor.

THE COURT: So that really doesn't add anything, to say Carter-Wallace is distinguishable on that ground because the point is if I find that JCG didn't make the statements, that's the end.

MR. PERRY: Let me offer two other grounds, just in case you have any concern about this made question, want to rule for us in the in connection with.

Blue Chip Stamps itself, Supreme Court case. The Court asked the question, quote: "May plaintiff base its action on Rule 10(b)(5) without having either bought or sold the securities described in the allegedly misleading prospectus?" End quote. The answer to that question, the holding of Blue Chip Stamps was no, the plaintiff may not base an action under 10(b)(5) without having bought or sold the securities described in the prospectus at issue.

The Second Circuit followed up on that in a case called Ontario Public Services Union v. Nortel, where that court said there is no 10(b)(5) liability, quote, "when the company whose stock the plaintiffs purchased is negatively impacted by the material misstatement of another company whose stock they did not purchase."

[Page 47]

That's this case, Your Honor. Those are the cases that have, the link having been broken, the reason that the materiality and in-connection-with requirements have not become entirely conflated is that Carter-Wallace and the rest of those cases have an issue about the statement by the same company where the statements by different companies, again, there is not liability except in that narrow Semer-

enko type circumstance where there's an active acquisition or sale.

THE COURT: But again, if I found that there were sufficient allegations that JCG made the statements, then Carter-Wallace would not provide a defense.

MR. PERRY: I disagree, Your Honor. If JCG made the misstatements, we don't agree that they did --

THE COURT: No. I'm not saying they did. But assume that I find that they did.

MR. PERRY: Clearly, the misstatements would still be in a document directed to a different group of persons, the fund investors. Carter-Wallace, they were to the medical professionals, the trade. Carter-Wallace says, we can only presume reliance, remember, this is the Basic case, in those circumstances if the plaintiff proves at trial that market analysts in fact relied on those statements in the trade journals.

Your Honor, the in-connection-with element is a required element of the private 10(6)(5) cause of action. If **[Page 48]** that must be proved under Carter-Wallace, it must be pleaded in this Court under the PSLRA and 9(b).

The plaintiffs have to make that link that they have not made in their complaint. There is not an allegation in this complaint that securities analysts relied on the fund prospectuses in valuing the equity securities of Janus Capital Group, and for an obvious reason. One, I'll bet many analysts would never even read them. And two, the fund prospectuses contain all kinds of statements that might well be material to a fund investor, allocation of shares between debt and equity and so forth, that have no bearing on the

decision by a stock market investor to acquire the equity securities of a publicly-traded, diversified financial holding company.

Your Honor, just give you a concrete example. The fund prospectuses say that no more than 15% of the assets shall be held in illiquid investments. That might be very important to a fund investor. If it goes to 20% they might care because it affects the liquidity of the funds.

Unclear to me, certainly isn't obvious in the complaint, why any securities analyst would care about that in the context of investing in JCG Equity securities. These statements are sort of the same. And that really comes back to the Putnam case and duty that runs from the adviser out to the public shareholders.

The plaintiffs say Putnam shouldn't be followed because **[Page 49]** Putnam was a small part of Marsh and McLennan and Janus Capital Management's a big part of Janus Capital Group.

Your Honor, duties are not dependent on diversification. Either the adviser owes a duty to the public shareholders or it doesn't. And here we would submit there is no duty.

THE COURT: Let me go back. The absence of a specific allegation of the security analyst would take it into account. There is no question that based upon the filings, it's been referred to in the papers, Mr. Press referred to it again today, that a large percentage of JCG's revenues are derived from assets under management by the funds.

MR. PERRY: That is correct, Your Honor.

THE COURT: And we know that there was a decided -- well, you may not accept this, but according to the allegations a decided market adjustment after it was publicly acknowledged that market timing had been occurring, despite what was said in the prospectuses.

MR. PERRY: There was.

THE COURT: So couldn't one infer from those allegations, I mean, subject to proof, that the market was taking into account in valuing JCG stock the veracity of the representations in the mutual fund prospectuses about there not being market timing?

MR. PERRY: Your Honor, I think that is hindsight of **[Page 50]** precisely the sort that the Fourth Circuit in the Longwood case said that courts can indulge in. The market reacts to a variety of factors. The market reacts just to having a company's name in the newspaper, on the wire, particularly if it's associated with alleged misconduct. Remember, on that date, September 3rd, we had only the allegations of Mr. Spitzer to go on and nobody knew whether they were true or not.

I think the notion that the market was thereby correcting for statements in fund prospectuses that had been issued for years previously is exceedingly speculative. And certainly the stock dropped, as the Court indicated. Publicity and other factors tended to that announcement.

This is where, I'm going to argues the proximate causation point. We would get into the factual question, then, of doing event studies and progression analyses and so forth. You try to sort out the various market effects generally and in regard to this. But I certainly don't think it's evidence of the pre Septem-

ber 3rd, 2003 study by the market analysts of these detailed features of the fund prospectuses.

THE COURT: Well, assume with me for a moment that were to find that there are sufficient allegations that JCG made the statements. I understand that's an assumption you wouldn't want to make but let's just assume it for purpose of analysis. And assume, despite what I said before, I did allow a third amended complaint simply to add an allegation, if it could be **[Page 51]** made in good faith, that securities analysts took into account in valuing JCG securities representations made about the lack of market timing in the funds. Would that be sufficient to overcome what you say are the distinguishing features are Carter-Wallace?

MR. PERRY: Your Honor, the fact would remain that this plaintiff never purchased the security described in the prospectus in which the misstatements were made. I think that Blue Chip Stamps bar remains.

THE COURT: But if you're right about that, and you may be, then Carter-Wallace is wrong.

MR. PERRY: No, Your Honor, Carter-Wallace didn't involve a prospectus statement by --

THE COURT: Oh, no. No. No. No, it's not. But they did buy, these plaintiffs bought, under this hypothetical that I just gave you, the stock of the person who, at least of one of the persons who made the statement.

MR. PERRY: But not the securities described in the prospectus. I think at some level of the law, you asked previously about dividing lines. Registration statements made with the Securities and Exchange Commission, I think, provide --

THE COURT: Obviously, I do have intellectual problems with it. I haven't read it, but I think I do remember. He's right about the Sotheby's case. Sotheby's is a securities case which, the gravamen of which is there had been antitrust violations.

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MR. PERRY: Correct, Your Honor, although there were express statements about the, by the issuer about the issuer's compliance with the law, in my recollection, which are, believe, absent here. Your Honor, I'm also not sure, I won't agree that Sotheby's correctly decided. I think, frankly, there are a lot of these District Court cases that go past the Motion to Dismiss. They may have close facts and they may think we need to go to summary judgment.

The hypothetical, which is not in this case, you just gave me, may be closer to that kind of case.

THE COURT: Certainly, representations in prospectuses that you engage, you obey the law and engage in ethical business practices don't give rise to a fraud claim, do they?

MR. PERRY: Generally don't as the kind of statement that the Fourth Circuit has said over and over again is the sort of general, feel good for investor statement that is not actionable on the misstatement prong. You would never get to these other issues.

Your Honor, just to bring that home. If that would be a summary judgment question, okay. But that's not this case. This case is a Motion to Dismiss case. We urge the Court to adhere to its tentative ruling.

The Fourth Circuit, if plaintiff chooses to appeal, in the ERISA case we already have it, is fully briefed, we already have a May argument date. The Fourth Circuit is not sitting on **[Page 53]** cases coming out of this court.

And the other cases --

THE COURT: No. No. No. They know to watch them very carefully. So they probably take them on an expedited basis.

MR. PERRY: The rest of the case will either go or not go, but the documents aren't going anywhere.

THE COURT: Thank you.

MR. PERRY: Thank you, Your Honor.

THE COURT: Thank you, Mr. Perry. Mr. Press, take a short, just let Mary change paper. Thank you.

If he wants to, Mr. Perry will get the last word, but he may not need it.

MR. PRESS: Thank you, Your Honor. I appreciate the Court's patience. I will try to be brief at this point. Just clarifying a few issues.

First of all, Mr. Perry said that the prospectuses were prepared by JIF, the fund itself. The statements were made by the funds. The SEC was just talking about filing, aiding and abetting, whatever he said. The SEC consent order says JCM, quote, "made an untrue statement of material fact." End quote. You know, you call it filing, you call it aiding and abetting. I believe it says made an untrue statement, it means made an untrue statement.

Furthermore, the notion that prospectuses were prepared by JIF seems to fly in the face of the prospectus representations **[Page 54]** that the opera-

tions of the funds themselves are all handled by JCM. The Court had actually, as we discussed before, dismissed JIF out of the investor, the fund investor complaint on the grounds that it does not do anything.

I believe that, certainly at the very least, there is a question of fact there as to whether or not JCM made statements. And even though the SEC's consent order is not binding, this is a Motion to Dismiss. It's not our task to prove anything. We have evidence and that is evidence that I think at least raises a fact issue.

Then Mr. Perry said that no public, no published decision ever held an investment adviser liable merely for distribution of a prospectus that was knowingly false or knowingly misleading. In fact, there are several courts that have said that if you knowingly disseminate someone else's false statements, that might be enough to give rise to liability.

Your Honor found in, and I really apologize for my butchering the pronunciation of this one, Parthasarathy v. RS Investment Management, that's P-A-R-T-H-A-S-A-R-A-T-H-Y. That was the RS case, that you had one defendant who was basically an underwriter that was the distributor and principal underwriter of the funds. Claim was stated against that defendant even though, at least according to the briefing, and I attached the relevant excerpts from the the briefing to my papers, the fund, the distributor there did not make any statements, file any **[Page 55]** statements. It was involved in distribution of statements that were known by it to have been false. And that's not the only, you know, Your Honor is not the only justice to have found that, not the only judge to have found that.

We had cited in our briefing to the Oxford Health Plans case where the Court said that plaintiffs properly pled securities claims when they alleged that those defendants who did not directly make the fraudulent statements had knowledge and assisted in the perpetration by drafting, reviewing and/or disseminating.

THE COURT: Well, that's exactly what Mr. Perry said. He said the Oxford cases are distinguishable because whoever it was was involved in, even if they did not pen the document, assisted in its preparation.

MR. PRESS: Well, it says "and/or." And by the way, at this point, Your Honor, I would submit that it cannot be said as a matter of law, given the documents that demonstrate --

THE COURT: No. No. No. Wait a second. The question was what was alleged in the complaint. You did not allege in the complaint that capital, Janus Capital Group was actually, had an input into the preparation of the prospectus.

MR. PRESS: I'm not entirely sure that that's --

THE COURT: Certainly hasn't been the focus.

MR. PRESS: I believe we allege that and the defendant said, that's not true, the prospectuses were filed --

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THE COURT: In any event, I had not understood that. That would have changed the nature of the --

MR. PRESS: And whether or not Janus Capital Group prepared the statements, Janus Capital

Management, which I know is an entirely a different issue, I believe that there has been evidence that they did prepare the prospectuses. For a variety of reasons, we pointed out the prospectuses themselves said Janus Capital Management handles all our operations. The SEC consent order as well said that Janus Capital Management made the statements.

I know that's different than Janus Capital Group. But still, when you have cases that talk about, like the RS, the RS Investment Management case, the preparation and/or dissemination is what Oxford said, preparation and/or dissemination.

Livent was talking about an investment banker who directly participated in the fraud by soliciting and selling notes to investors and the public without disclosing material facts. The investment banker was CIBC, which again solicited and sold notes to investors. The Court went on to say, in pressing the notes upon investors, CIBC conveyed an expression the price of the securities reflected a fair market value.

The point is there was pressing the notes upon investors as opposed to making the statement. This was in In Re Livent, which we cited in our brief, 174 F. Supp. 2d, 144 at 150.

And this reviewing and/or disseminating language was [**Page 57**] also in the Global Crossing case, which we also had cited in our brief. And it all comes down to that providing substantial assistance. And while our pleading of scheme liability separate and apart from dissemination might not have been a model of clarity, to suggest that there can be no factual allegations of scheme liability that we could possibly assert here would fly in the face of this Court's ruling in the fund investor case where there was a

scheme, and although the funds themselves had no liability in that scheme, JCG and JCM did.

Now, Mr. Perry also, when he was discussing omissions, and we have a misrepresentation case, not an omissions case, and, you know, he never understood our case to possibly be asserting an omissions claim, in fact, if you look at Page 10 of our April 22, 2005 brief, that was our first brief, there's a whole discussion there about the duty that one has to tell the whole truth and how literally true statements can, if misleading or incomplete, give rise to liability.

So, you know, this is in April, 2005 in our brief. So it's not like the concept of an omission is a new concept.

Then Mr. Perry, in distinguishing the Semerenko cases and that whole line of cases, he says that Semerenko, I guess it was a tender offer situation. And in a tender offer situation, you have a duty. And it's true that a tender offeror has some sort of duty to the shareholders of the target corporation. But in Semerenko, the suit was not by shareholders in the target **[Page 58]** corporation. The suit was by investors in the target corporation, people who were injured because they were misled before they were shareholders into becoming shareholders.

People who aren't yet shareholders of a target tender offer are not owed a duty by the tender offeror.

Like I said, the suit was investors. It was not the shareholders. The liability was not predicated in Semerenko on the fact that it was a tender offer and these people were owed a duty in the context of a

tender offer. Liability in Semerenko was predicated very simply --

THE COURT: I get these cases all confused. How could there be any -- I mean, I understand the distinction. But why doesn't that, this has got nothing to do with this case I don't think, but why doesn't that run into a Blue Chips problem? Because they did make the investment.

MR. PRESS: Right. Because they made the investment. The point was you had a statement that in its context was likely to be relied on.

THE COURT: No. No. That's the answer. They actually purchased. But they still had an affiliation with the target.

MR. PRESS: There was an affiliation, much the way there's clearly an affiliation here between JCG and the plaintiffs, between JCM and the plaintiffs.

THE COURT: "Affiliation" is an awfully broad word but it's my own.

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MR. PRESS: Definitely an affiliation. You look at Zelman. Zelman was no affiliation at all. The defendants actually disclaimed even knowing about the existence of the plaintiffs in Zelman. But because the price of the plaintiffs' securities was likely to be impacted by news concerning the defendants' securities, a claim was stated. Zelman was a claim where investors in a UBS-issued derivative were able to bring a claim against JDS Uniphase for misrepresentations made by JDS Uniphase about JDS Uniphase.

The Masnik case, as we discussed before, also, was no tender offer. Bolar Pharmaceuticals made

misrepresentations about its own product. And because of the relationship and the competition between its product and Smith Kline, it was foreseeable and therefore material to Smith Kline investors. No relationship created by a tender offer.

Mr. Perry discussed the Ontario Public Pension Fund v. Nortel case out of the Second Circuit. And the Ontario v. Nortel case, the Court made very clear it was not discussing in connection with. As a matter of fact, it distinguished Semerenko on those grounds. It said Semerenko, that dealt with in connection with. We're not dealing with that here.

And in the Ontario Public Pension Fund, you didn't have the situation where the defendants and the plaintiffs and the plaintiffs' company and the defendants' company had the same officers. You did not have a situation where --

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THE COURT: Mr. Perry, I think, I understand, I was just repeating, if my recollection was he said, he found no case in America, I assume anywhere in the world, I assume there's not one in the Cayman Islands, in which any court has held that the adviser has an upstream duty to the shareholders of the parent. Is that your understanding as well?

MR. PRESS: I do not know of any case, either. I don't dispute that. A case finding an adviser having an upstream duty, no. But cases finding that anybody who makes a misrepresentation where it is likely to be relied upon and likely to impact on publicly-traded securities and it's a knowing misrepresentation and the impact is known, and here the impact is known because JCM's wholly owned --

THE COURT: I understand. I understand.

MR. PRESS: It's a very different situation. Perhaps this set of, Mr. Perry can't find a set of circumstances where the Court went the other way in a situation like this, either, because it's a unique set of circumstances. The closest he could come is Fischbein. And I discussed already why Fischbein is different.

On the issue of in connection -- and also, the duty is in large part a question of control. This is JCM, JCG, it's the same people. You have --

THE COURT: You're not trying to pierce the corporate veil. A couple times you've been telling me that they're all the **[Page 61]** same. You're not actually trying to pierce the corporate veil here, are you?

MR. PRESS: We don't have to pierce the corporate veil here. The cases that I just provided to Your Honor, the case that I just cited, were completely distinct corporations. Nobody claims that ABI and Cendant were the same corporation or UBS and JDS Uniphase are the same corporation, or Raytheon and Washington Group are the same corporation. But when you make public statements and you tell everybody what these people, who have the same officers as we do, what they say and do is the end all and be all for our business, and our fortunes rise and fall with them, I think that that gives rise to a duty.

Mr. Perry said duties are not dependent upon diversification. And I suppose that statement is true insofar as it goes. Duties are not predicated on diversification, but they are predicated on foreseeability. And that's what Semerenko says. Semerenko says it's a question of foreseeability. And they're also predicated on JCG's own SEC findings.

THE COURT: Would you agree with Mr. Perry that if this case went to summary judgment at a trial you would have to produce an expert, a securities analyst or other expert who would testify that, in fact, the market took into account in valuing JCG stock the representations made in the prospectuses for the mutual fund?

MR. PRESS: Sure. And in any securities case post **[Page 62]** Dura, at trial plaintiffs have to produce an expert that the market relied on in reliance, and in an efficient market was impacted by whatever the misrepresentations were.

He suggests that we haven't pled that level of reliance. In fact, in that most recent letter brief that we wrote, Your Honor, on February 27, we set forth exactly how we pled the efficiency of market, which doesn't seem to be in dispute here, the materiality of any JCG statements, of any JCM statements or any fund statements or activities to JCG, the fact that the efficient market was artificially inflated as a result of those misrepresentations.

That's reliance. That's reliance under, that's reliance under Basic. I mean, if you look at, I think we even say reliance straight out.

So we do plead that. And obviously, we would have to prove it if we were to get to trial or summary judgment.

Mr. Perry had pointed out that one distinction between our case and Blue Chip was that the plaintiff did not buy the securities described in the prospectus, and that's why under Blue Chip we don't have in connection with. But that puts us in the same realm as all those cases we've been discussing over and over again, Zelman, Masnik, Semerenko,

Muzinich, all of those. What they all had in common was the plaintiffs did not purchase the securities that were described by the defendants, but the relationship between the plaintiffs' and the defendants' **[Page 63]** securities was such that a reaction was foreseeable. In fact, there was a reaction. And we have that here.

You cannot claim that a reaction was not foreseeable here in light of the, in light of the various disclosures in the SEC filings. Even Sotheby's, where there were express statements about compliance with the law, JCG's 10-K filing also had representations about the heavily regulated environment and the problems that could befall us even if there's just a proceeding against us.

THE COURT: Well, whatever. I don't know if it was in the Janus case. I was kidding Mr. Perry about that. I certainly remember seeing somewhere that defendants were going to dismiss on the ground that under Fourth Circuit law vague statements about compliance and being good guys does not give rise to an actionable 10(b)(5) case. I'm sure; I'm sure I read that and I'm sure I've actually held that. But be that as it may.

MR. PRESS: You have held that, Your Honor. And the question really is, how vague were the statements?

THE COURT: Exactly.

MR. PRESS: What the relationship was between the statements.

THE COURT: I understand.

MR. PRESS: Your Honor definitely held that vague statements about being good guys.

We come back to the perfect crime. You say over and **[Page 64]** over again, anything that happens with these mutual funds, anything that happens with these mutual fund operations is going to be material. Your investment's going to sink or swim based on what happens with these mutual funds. You're telling investors, you're telling your wholly-owned subsidiary that runs the mutual fund, these investors are going to look to you, look to your activities. And lo and behold, they did. They did. And they did that to their detriment.

They lost a tremendous amount of money. There was a huge market cap decline when Attorney General Spitzer's complaint first came out and in the subsequent fallout. And that was entirely foreseeable, entirely predictable. As a matter of fact, under the circumstances the lack of an efficient market reaction would have been surprising.

THE COURT: Let me ask you a question. Again, talking about vague. We've got to stop. Unless there's an easy answer, don't answer it.

How does a company benefit from an artificially in place, artificially high value for its securities as opposed to its executives who hold the stock?

MR. PRESS: How does a company benefit? I suppose that ultimately the company --

THE COURT: I was thinking of incentives. I can certainly understand an executive who's got a, who holds a lot of stock or stock options or something, would have an incentive to **[Page 65]** make false representations in mutual funds to increase the revenues of the parent company. And it belies my ignorance of the securities market or finance. It wasn't clear to me an easy answer as to how JCG it-

self would benefit in any way from the fact that its share price was higher.

MR. PRESS: I will try to be very brief with the answer, Your Honor, especially since you've indulged me to this point.

First and foremost, to incur liability under 10(b)(5), the violator does not have to benefit.

THE COURT: I understand all that.

MR. PRESS: But as far as benefits, companies benefit, I suppose, to the extent that they use their stock as currency for acquisitions. And of course a company is only the sum total of its personnel. And the benefits to the personnel are obvious in terms of incentive corporation. A company is a product of its officers.

THE COURT: That makes sense. That makes sense. That's good.

MR. PRESS: I suppose that's it. And I do thank the Court.

THE COURT: Mr. Perry, do you want to have the last word? At least on, I don't know if you've even read, I'm not going to try to pronounce the plaintiff, the RS opinion or plan or --

[Page 66]

MR. PERRY: Parthasarathy, Your Honor. Parthasarathy, one, was a fund investor case, not a parent investor case. So the Court was simply applying Janus to those circumstances. The allegation in Paragraph 26 of the Parthasarathy v. RS complaint was that RS distributors was an underwriter and therefore strictly liable under Section 11 of the 33 Act.

The Court in its opinion took that as sufficient to say that it had sufficient involvement with the prospectus as to the misstatements. I don't know enough about RS to know whether or not that was a correct holding. That's all I know from reading the complaint.

Semerenko and so forth, the Court distinguished them all in Putnam. Here we are. Some of which is wrong. Muzinich is just wrong. I'll put that out there. I can talk about them if you want me to.

Mr. Press said his complaint perhaps is not a model of clear pleading. Not a model of clear pleading. But, he said, it just can't be the case that there's no set of facts that they could possibly prove to show that Janus was liable. That's almost a direct quote. Mary will have the right one.

That is the Rule 8 standard. This is not a Rule 8 case. This is a Rule 9(b) PSLRA case. The Fourth Circuit in the Hunter case, two weeks ago, affirming a dismissal of one of these cases, says that Congress changed the standard first by requiring plaintiffs to plead facts, and second, this is the important **[Page 67]** part, quote, "By authorizing the Court to assume that the plaintiff has indeed stated all of the facts upon which he bases his allegation of a misrepresentation or omission. Stated another way", continuing the quote, "we must ascertain whether the complaint states sufficient facts", highlighted, "to permit a reasonable person", highlighted, "to find that the plaintiff satisfied this element as claimed, that the defendant made a false or misleading statement."

Your Honor has the cases. Your Honor has the complaint. That element has not been made out. They're not there in the allegations. Second

amended complaint. No need for further amendment.

Please, the Court should dismiss it with prejudice, let the Fourth Circuit sort it out if there's anything to sort out. Thank you, Your Honor.

THE COURT: Thank you. Appreciate it. I'll do what the Fourth Circuit does and come down and shake your hands.

(Conclusion of Proceedings.)

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REPORTER'S CERTIFICATE

I, Mary M. Zajac, do hereby certify that I recorded stenographically the proceedings in the matter of In Re: Mutual Fund Litigation, Wiggins v. Janus, Case Number(s) MDL 1586; on March 6, 2007.

I further certify that the aforegoing pages constitute the official transcript of proceedings as transcribed by me to the within matter in a complete and accurate manner.

In witness whereof, I have hereunto affixed my signature this ____ day of _____, 2007.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN RE MUTUAL FUNDS INVESTMENT LITIGATION	MDL 1586
[Janus Subtrack]	Case No. 04-MD-15863
Wiggins v. Janus Capital Group Inc.	Case No. 04-CV-00818

JANUS DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Under Rule 33 of the Federal Rules of Civil Procedure, Defendants Janus Capital Group Inc. ("JCG") and Janus Capital Management LLC ("JCM") (collectively "Janus" or "Janus Defendants") hereby respond to Plaintiffs' First Set of Interrogatories ("Interrogatories") as follows:

GENERAL OBJECTIONS

Janus incorporates the following General Objections into their specific objections to each and every interrogatory:

1. Janus objects to the Interrogatories to the extent they call for information protected from disclosure by the attorney-client privilege, attorney work

product doctrine, or any other applicable privilege or doctrine.

2. Janus objects to the Interrogatories to the extent they seek information that is irrelevant or immaterial to the claims or defenses of any party and are not reasonably calculated to lead to the discovery of admissible evidence.

3. Janus objects to the Interrogatories to the extent they seek commercially sensitive or otherwise confidential information.

4. Janus objects to the Interrogatories as cumulative, duplicative, and unduly burdensome to the extent they call for information that is publicly available, already in the possession, custody, or control of the Plaintiffs, equally available to the Plaintiffs, or does not exist. Janus has already produced hundreds of thousands of pages of documents to the Plaintiffs, many of which contain information responsive to the Interrogatories. Janus reserves the right to not respond to Interrogatories where the burden of deriving or ascertaining the answer is substantially the same for Plaintiffs as it is for Janus. *See* Fed. R. Civ. P. 33(d).

5. Janus objects to the Interrogatories to the extent they seek to impose obligations different from those set forth in the Federal Rules of Civil Procedure and the Local Rules of this Court.

6. Janus objects to the Interrogatories as overbroad and unduly burdensome in the breadth of potential subject matter included within the Interrogatories.

7. Janus objects to the definition of "Relevant Time Period" to the extent it attempts to define what is relevant to this lawsuit.

8. Janus objects to Plaintiffs' definition of "Defendant" and "You" and "Your" to include "any of Defendants' predecessors (merged, acquired, or otherwise), successors, owners, subsidiaries, affiliates, divisions, and all present and former trustees, officers, directors, employees, agents, attorneys, investigators, representatives, consultants, contract hires, and other persons acting at a Defendant's direction or under its supervision or control," as this definition is overbroad and exceeds the requirements of Rule 33. Janus will abide by Rule 33 and furnish such information as is available to Janus.

9. Janus objects to Plaintiffs' definition of "Market Timing" as vague, ambiguous, and overbroad as it attempts to incorporate various definitions of the term, which themselves are not necessarily consistent. As used in these Responses, "Market Timing" means the frequent buying and selling of mutual fund shares to exploit any lag between changes in the value of the fund's portfolio of securities and the reflection of such changes in the fund's share price.

10. Janus objects to Plaintiffs' definition of "Discretionary Frequent Trading Arrangements" as vague, ambiguous, and overbroad as it attempts to incorporate various definitions of the term, which themselves are not necessarily consistent.

11. Janus objects to Plaintiffs' definition of "Anti Market Timing Restrictions" as vague and ambiguous.

12. Janus objects to Plaintiffs' definition of "Janus Fund Prospectuses" as vague, ambiguous, confusing, and overbroad. As used in these Responses, "Janus Fund Prospectuses" means only prospectuses issued by the seven Janus Funds identified

in Plaintiffs' definition of "Janus Funds," during the period from July 21, 2000, to September 2, 2003.

13. Janus objects to the Interrogatories to the extent they exceed the number of interrogatories permitted under Federal Rule of Civil Procedure 33.

14. Janus does not concede that any of its objections or responses to these Interrogatories are or will be admissible at the trial of this action or in any other proceeding in this action, and Janus does not waive any objection on any ground to the use of any such response at trial or in any other proceeding in this action.

15. Janus reserves the right to supplement or alter these Responses. Janus also reserves the right to rely, at the time of trial or in other proceedings in this action, upon documents and evidence in addition to the Responses provided herein regardless of whether, inter alia, any such documents and evidence are newly discovered or are currently in existence.

16. Plaintiffs should not assume, merely because Janus has asserted these General Objections, that documents or information exist that Janus would have produced or disclosed in the absence of these objections.

SPECIFIC OBJECTIONS AND RESPONSES

Subject to the foregoing General Objections, each of which is incorporated in each of the responses below, and without waiving those objections, Janus responds to the Interrogatories as follows:

INTERROGATORIES

INTERROGATORY NO. 1:

Identify the names and titles of all persons who had positions as Officer, Director or employee of JCM who played any role in drafting, editing, reviewing or filing Janus Fund Prospectuses.

RESPONSE TO INTERROGATORY NO. 1:

Janus objects to this Interrogatory as overbroad and unduly burdensome. Subject to and without waiving this objections and the General Objections set forth above, Janus states as follows:

The following information describes the operation of the Trusts during the putative class period, *i.e.*, from July 21, 2000, to September 2, 2003.

The Janus mutual funds ("Janus Funds" or "the Funds") are organized under three separate Trusts: Janus Investment Fund, Janus Adviser Series, and Janus Aspen Series. Each Trust is a separate legal entity—a business trust organized under state law—and each is governed by a Board of Trustees. Each Trust is a registered investment company under the Investment Company Act of 1940, as amended (the "1940 Act"), and each Trust registers and offers securities to the public. Each Trust includes several series (*e.g.*, the Janus Mercury Fund is a series of the Janus Investment Fund), which are also registered as investment companies, and certain series include several share classes.

The shares of the Trusts are entirely owned by the persons who have purchased the securities issued by the series of each Trust, which generally are organized as open-end mutual funds (which means that the shares are continually for sale and may be

redeemed or exchanged at any time, at a price set once daily pursuant to federal law). The securities are registered with the SEC pursuant to the Securities Act of 1933 and offered pursuant to registration and other materials that are subject to the requirements of various federal securities laws. Each Trust (or a series thereof) is the "registrant" and issuer of the securities. Although the funds "do not 'conduct any operating or investment activities on their own,'" *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 853 n.3 (D. Md. 2005), they are responsible for complying with the securities laws, including the preparation, amendment, and filing of registration statements and similar materials. The offering materials for the Trusts' securities include, for each series, a prospectus and statement of additional information ("SAI"), which is incorporated by reference into the prospectus.

Janus Capital Management LLC ("JCM") is the investment adviser to the Janus Funds, and is subject to the requirements of the Investment Advisers Act of 1940, as amended. JCM does not govern the Funds, in law or in fact—that is the task of each Trust's Board of Trustees. JCM and the Funds have a purely contractual relationship, as spelled out in advisory (or management) agreements or administration agreements (collectively, the "Contracts") that, pursuant to the requirements of the 1940 Act, are reviewed and approved annually by the Board of Trustees.

The Funds' prospectuses summarize the services provided and duties performed by JCM pursuant to the Contracts, including the "day-to-day management" of the "business affairs" of the Funds. These services do not include the preparation, amendment,

or filing of prospectuses and related offering documents. The prospectuses do not state or imply that JCM is the issuer or registrant of the securities being offered, and none of the statements in the prospectuses is attributed to JCM. Rather, the registration statements (SEC Form N-1A) are filed "[o]n behalf of" the Funds to "update the financial information of the Trust." The prospectuses, which refer to the "Funds' Statement of Additional Information," state that the Funds bear the "costs of preparing, printing and mailing the Funds' Prospectuses and SAI to current shareholders."

Each of the several prospectuses, and all amendments to the prospectuses, were prepared by legal counsel to the Trusts and approved (ratified) by the Board of Trustees. Lead plaintiff has previously asserted that an ALJ found that "the prospectuses 'were approved by the Board [of JCM].'" *See* Plaintiffs' Response to Interrogatory No. 7 (bracketed phrase added by lead plaintiff). In fact, the ALJ decision defines the "Board" as the Board of Trustees of the Trusts. *In re Lammert*, SEC Decision Release No. 348, Admin. Proc. File No. 3-12386, at 12 (Apr. 28, 2008). This Board, which is independent of JCM as required by law, *see Burks v. Lasker*, 441 U.S. 471, 482 (1979), does indeed have the sole authority to approve the prospectuses. The Trustees could, and often did, request that additional disclosures be added to the prospectuses. During the class period, the following individuals served as Trustees:

- **Thomas H. Bailey**: c/o Mary Clark, Williams & Connolly LLP, 725 Twelfth Street, N.W., Washington, D.C. 20005, (202) 434-5000.

- **James P. Craig III**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.
- **Gary O. Loo**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.
- **William F. McCalpin**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.
- **John W. McCarter**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.
- **Dennis B. Mullen**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.
- **James T. Rothe**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.
- **William D. Stewart**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.
- **Martin H. Waldinger**: c/o John W. Rotunno, Bell, Boyd & Lloyd LLC, 70 West Madison Street, Suite 3100, Chicago, IL 60602, (312) 372-1121.

The Trusts had both outside counsel (Lester Woodward of the law firm Davis, Graham & Stubbs,

and lawyers and paralegals acting under his supervision) and inside counsel (Tom Early, as General Counsel to the Trusts, and lawyers and paralegals acting under his supervision). In addition, the Independent Trustees had separate counsel (Cameron Avery of the law firm Bell, Boyd & Lloyd LLC, and lawyers and paralegals acting under his supervision). These lawyers also had other clients. Mr. Woodward represented other mutual funds and their boards, as well as clients in other industries. Mr. Early was also a member of JCM's legal department and represented the adviser in various matters. And Mr. Avery represented other mutual fund trustees and boards. These lawyers, like most lawyers, wear multiple hats: They may perform services for the Trust on a Monday, and for another client on a Tuesday. The SEC is well aware of the dual role played by inside counsel, and has acknowledged that "such an attorney, though employed by the investment adviser rather than the investment company, is providing legal services for the investment company" and that "the logical implication of that fact" is "that the attorney employed by the investment adviser is accordingly representing the investment company." *Implementation of Standards of Professional Conduct for Attorneys*, SEC Release No. 33-8186, 68 Fed. Reg. 6296, 6302 (Feb. 6, 2003).

The Janus Fund prospectuses (including the Janus Equity Funds Prospectus, dated February 28, 2003) were drafted before the beginning of the class period by Kelley Howes, Bonnie Howe, and other members of JCM's legal department, acting in their capacity as legal counsel to the Trusts, and were approved by the Board of Trustees before transmission to the SEC or distribution to investors. During the class period, various revisions and amendments to

the prospectuses were made. The persons ultimately responsible for such changes were Mr. Woodward (principal outside counsel) and Mr. Early (principal inside counsel). All changes were approved by the Board of Trustees of the respective Trust before prospectus amendments were provided to the SEC.

While approximately 17 persons concurrently held positions with the Trusts and JCM, only those employed in the legal department were responsible for drafting language in the Fund prospectuses. Other than members of the legal department, no officer, director, or employee of JCG or JCM was responsible for drafting language in the Fund prospectuses (although they may have reviewed and commented on that language). With respect to those individuals who were employed in the legal department, they drafted language in the Fund prospectuses—including the review of comments received from others—in their capacities as legal counsel to the Trusts, not JCM. Thus, while individuals in JCM's legal department "'had the responsibility for drafting the prospectuses,'" *see* Plaintiffs' Response to Interrogatory No. 7, or "played a role in drafting the prospectus," *id.*, they discharged that responsibility or played that role in their capacity as counsel to the Trusts, not JCM. Similarly, the prospectuses were "filed" (submitted to the SEC) by legal counsel to the Trusts, in the Trusts' name.

At various times during the class period, proposed amendments to the prospectuses were circulated to JCM personnel for review and comment. Such personnel included portfolio managers, salespeople, compliance officers, and persons responsible for the back-office operations. These individuals were not authorized to make changes to the prospec-

tus language; rather, they could make comments that were reviewed by legal counsel to the Trusts and ultimately adopted (or not) by the Board of Trustees. It is not possible to identify by name and title every person who may have reviewed prospectus language during the class period. With respect to the "excessive trading policy" and similar provisions contained in certain of the prospectuses, however, the following persons (listed with the position each held during the class period) may have reviewed such language:

1. **Dave Agostine**: Vice President, Institutional Service, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.
2. **Christie Alford**: Fund Accounting Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.
3. **Cindy Antonson**: Senior Legal Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.
4. **Will Bales**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.
5. **Robin Beery**: Chief Marketing Officer, c/o Peter J. Romatowski, Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, (202) 879-3939.

6. **Emily Boyle**: Copy Director, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

7. **Kelly Calocci**: Associate Counsel, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

8. **Laurence J. Chang**: Portfolio Manager, c/o Andrew J. Petrie, Featherstone Petrie DeSisto LLP, 600 17th Street, Suite 2400S, Denver, CO 80202, (303) 626-7100.

9. **Caroline Churchill**: Channel Marketing Director, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

10. **Mark Cohen**: Senior Manager, Internet Strategy & Development, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

11. **David Corkins**: Portfolio Manager, c/o Andrew J. Petrie, Featherstone Petrie DeSisto LLP, 600 17th Street, Suite 2400S, Denver, CO 80202, (303) 626-7100.

12. **David Decker**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

13. **Thomas Early**: General Counsel and Chief Corporate Affairs Officer, c/o Eric S. Waxman, Skadden, Arps, Slate, Meagher & Flom

LLP, 300 South Grand Avenue, Suite 3400, Los Angeles, CA 90071, (213) 687-5251.

14. **Anita E. Falicia**: Vice President, Investment Accounting, c/o N. Reid Neureiter, Jacobs Chase Frick Kleinkopf & Kelley LLC, 1050 17th Street, Suite 1500, Denver, CO 80265, (303) 685-4800.

15. **Curt Foust**: Vice President and Assistant General Counsel, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

16. **Gregory Frost**: Vice President and Controller, c/o Peter J. Romatowski, Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, (202) 879-3939.

17. **Jim Goff**: Director of Research, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

18. **Rick Grove**: Compliance Director, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

19. **George W. Hagerman**: Vice President, Institutional Service, c/o Richard S. Vermeire, Perkins & Coie LLP, 1899 Wynkoop Street, Suite 700, Denver, CO 80202, (303) 291-2300.

20. **Michelle Hampton**: Director, Electronic Marketing, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

21. **Sean Hampton**: Director, TA Operations, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

22. **Helen Y. Hayes**: Managing Director of Investments, c/o David C. Mahaffey, Sullivan & Worcester LLP, 1666 K Street, N.W., Washington, D.C. 20006, (202) 775-1200.

23. **Anya Hodges**: Assistant Vice President, Taxation, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

24. **Bonnie M. Howe**: Vice President and Assistant General Counsel, c/o Daniel F. Shea, Hogan & Hartson LLP, One Tabor Center, 1200 Seventeenth Street, Suite 1500, Denver, CO 80202, (303) 454-2475.

25. **Kelley Abbott Howes**: Vice President of Domestic Funds and Assistant General Counsel, c/o N. Reid Neureiter, Jacobs Chase Frick Kleinkopf & Kelley LLC, 1050 17th Street, Suite 1500, Denver, CO 80265, (303) 685-4800.

26. **R. Timothy Hudner**: Chief Operations Officer, c/o Peter J. Romatowski, Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, (202) 879-3939.

27. **Jane Ingalls**: Vice President, Corporate Communications & Investor Relations, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

28. **David R. Kowalski**: Vice President and Chief Compliance Officer, c/o N. Reid Neureiter, Jacobs Chase Frick Kleinkopf & Kelley LLC, 1050 17th Street, Suite 1500, Denver, CO 80265, (303) 685-4800.

29. **Doug Laird**: Vice President, Investor Operations, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

30. **Warren Lammert**: Portfolio Manager, c/o Graeme W. Bush, Zuckerman Spaeder LLP, 1800 M Street, N.W., Suite 1000, Washington, D.C. 20036, (202) 778-1800.

31. **John M. Leuthold**: Channel Marketing Director, c/o Josiah O. Hatch, Ducker, Montgomery, Lewis and Aronstein, P.C., One Civic Center Plaza, 1560 Broadway, Suite 1400, Denver, CO 80202, (303) 861-2828.

32. **Mike Lu**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

33. **Matt Luoma**: Vice President of Tax and Treasurer, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

34. **Brent Lynn**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

35. **Christine Malles**: Associate Counsel, c/o Mark A. Perry, Gibson, Dunn & Crutcher

LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

36. **Tom Malley**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

37. **John J. Mari**: Vice President for Institutional Operations, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

38. **Joleda Martin**: Head of Training & Development, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

39. **Eric Montag**: Vice President, Corporate Planning and FI, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

40. **Blaine Newby**: Vice President, Investor Communications, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

41. **Stuart Novek**: Chief Marketing Officer, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

42. **Glen O'Flaherty**: Vice President of Investment Accounting, c/o Anthony W. Djinis, Pickard and Djinis LLP, 1990 M Street,

N.W., Suite 660, Washington, D.C. 20036, (202) 223-4418.

43. **Eric Overholt**: Compliance Director, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

44. **Brett Pearson**: Director of Marketing Support, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

45. **Sharon Pichler**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

46. **Stephanie Queisert**: Director of Financial Reporting, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

47. **Judy Reed**: Legal Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

48. **Karen Reidy**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

49. **Blaine Rollins**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

50. **Sandy Rufenacht**: Portfolio Manager, c/o Anthony W. Djinis, Pickard and Djinis LLP,

1990 M Street, N.W., Suite 660, Washington, D.C. 20036, (202) 223-4418.

51. **Ron Sachs**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

52. **Amber Sanders**: Senior Legal Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

53. **Scott Schoelzel**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

54. **John Schreiber**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

55. **Kevin Smith**: Assistant Vice President, Investor/Client Self-Service, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

56. **Lars O. Soderberg**: Executive Vice President of Institutional Services, c/o Richard W. Beckler, Howrey Simon Arnold & White LLP, 1299 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 783-0800.

57. **Ron Speaker**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

58. **Loren Starr**: Vice President and Chief Financial Officer, c/o Peter J. Romatowski,

Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, (202) 879-3939.

59. **Stephen Stieneker**: Chief Administrative Officer, Investments, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

60. **Bradley Swenson**: Senior Audit Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

61. **Mark Thomas**: Vice President of Marketing and Communication, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

62. **Tracy Thomas**: Marketing Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

63. **Eric Thorderson**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

64. **Aaron Walter**: Director of Portfolio Analytics, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

65. **Heidi Walter**: Vice President and Assistant General Counsel, c/o Julian W. Friedman, Stillman & Friedman, P.C., 425 Park Avenue, New York, NY 10022, (212) 223-0200.

66. **Mark B. Whiston**: Chief Executive Officer, c/o Peter J. Romatowski, Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, (202) 879-3939.

67. **Lynn Williams**: Senior Legal Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

68. **Justin Wright**: Associate Counsel, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

69. **Jason Yee**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

70. **Claire Young**: Portfolio Manager, c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

INTERROGATORY NO. 2:

Identify the names and titles of all persons who had positions as Officer, Director or employee of JCG who played any role in drafting, editing, reviewing or filing Janus Fund Prospectuses.

RESPONSE TO INTERROGATORY NO. 2:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 3:

For all persons identified in response to Interrogatory Nos. 1 and 2, identify those persons who were also Officers, Directors or employees of the Janus Funds themselves.

RESPONSE TO INTERROGATORY NO. 3:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 4:

Identify any Independent Fund Employees who participated in drafting or editing any Janus Fund Prospectuses.

RESPONSE TO INTERROGATORY NO. 4:

Janus objects to this Interrogatory on the grounds that "participated in" is overbroad, vague, and ambiguous. Subject to and without waiving this objections and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 5:

For all persons identified in response to Interrogatory No. 4, identify exactly what role they played.

RESPONSE TO INTERROGATORY NO. 5:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 6:

Identify all persons who had positions as Officer, Director or employee at JCM who entered into or approved discretionary frequent trading arrangements.

RESPONSE TO INTERROGATORY NO. 6:

Janus objects to this Interrogatory as compound. Subject to and without waiving this objection and the

General Objections set forth above, Janus states as follows:

Beginning in approximately July 2003, JCM undertook a massive investigation into allegations that JCM personnel entered into discretionary frequent trading arrangements with certain investors. As a result of that investigation, JCM identified 12 persons or entities with discretionary frequent trading arrangements, as described in the SEC Order entered into between JCM and the Securities Exchange Commission ("SEC") on August 18, 2004. The 12 persons or entities were:

1. John Parker/Rick Masseaux,
2. Canadian Imperial,
3. Dave Byck/Canadian Imperial,
4. Principia C Inv Partners,
5. Rydex,
6. Shorewood LLC,
7. Signalert,
8. Thornberry Hill,
9. Tripod LLC,
10. Trautman,
11. Ikebana, and
12. Round Hill.

Two of the entities, Dave Byck/Canadian Imperial and Principia C Inv Partners, did not fund their accounts during the period at issue, and, therefore, did not engage in any transactions. A third entity, John Parker/Rick Masseaux engaged in transactions but did not exceed any restrictions on the frequency of trading. JCM is not aware of any other entities with which JCM entered into discretionary frequent trading arrangements.

JCM developed, in consultation with Ernst & Young and the Independent Distribution Consultant

("IDC"), a list of accounts maintained by the 9 entities identified above that were used for discretionary frequent trading. The accounts are:

Frequent Trader	Account Numbers			
Canadian Imperial	0648062456			
Ikebana	Schwab Account			
	0000021606			
Round Hill	0641073050	064107 3373	064107 3374	0641073375
	0641073376	064107 4032	065004 2429	0654021667
	0654021668	065402 1735	065402 1756	0654021805
	0654021873	065402 1874	065070 1731	0650701764
Rydex	r8e-000019	r8e-000027	r8e-000035	
	0150117800	030609 3397		
Shorewood	0306577287			
Signalert	0306609020	030660 9021		
Thornberry	0306577279			
Trautman	0641069778	064107 0509	064805 5878	0648059871
	0648059872	064806	064806	0648062395

Frequent Trader	Account Numbers			
		2148	2201	
	0648062396	064806 2413	064806 2414	0650039828
	0650041918	075006 2945	075006 3703	0750063704
	0650300852	065030 0897	065030 0913	0650301004
	0650301103	065030 1211	065070 0921	0650700981
	0650701553	065070 1688		
Tripod	0306324727			

JCM is not aware of any other accounts that were used for discretionary frequent trading.

Between November 2001 and September 2003, the discretionary frequent trading activity occurred in seven Janus funds:

1. Adviser International Growth (I Shares),
2. Adviser Worldwide (I Shares),
3. Enterprise,
4. High Yield,
5. Mercury,
6. Overseas, and
7. Worldwide.

JCM is not aware of discretionary frequent trading activity in any other funds. The chart below indicates the time period for each fund, starting with the first date on which a discretionary frequent

trader was approved to trade in the fund, and ending with the date the discretionary frequent trading arrangement was terminated or the last date on which a discretionary frequent trader transacted in the fund.

1.	Adviser International Growth (I Shares)	(4/8/02–9/22/03)
2.	Adviser Worldwide (I Shares)	(4/30/02–9/22/03)
3.	Enterprise	(6/12/02–9/4/03)
4.	High Yield	(11/26/02–9/10/03)
5.	Mercury	(11/7/01–9/4/03)
6.	Overseas	(11/30/01–9/10/03)
7.	Worldwide	(1/28/03–9/10/03)

Certain members of JCM's sales group negotiated the discretionary frequent trading arrangements orally or through email communications but did not otherwise document agreements with the discretionary frequent traders in written contracts. The chart below indicates the nine discretionary frequent traders and the portfolio manager and principal salesperson responsible for the arrangement. Some of the individuals listed below have separate representation, but all can be contacted through Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500.

Trader	Portfolio Manager(s)	Salesperson
Canadian Imperial	Warren Lammert	Lance Newcomb
Rydex	Sandy Rufenacht	Lance Newcomb
Shorewood LLC	Sandy Rufenacht	Lance Newcomb
Signalert	Sandy Rufenacht	Lance Newcomb
Thornberry Hill	Sandy Rufenacht	Lance Newcomb
Tripod LLC	Sandy Rufenacht	Lance Newcomb
Trautman	Helen Hayes, Warren Lammert, Sandy Rufenacht	Lance Newcomb
Ikebana	Sandy Rufenacht	Charles Williamson
Round Hill	N/A	Paul Lucas

Under these agreements, JCM usually negotiated a certain number of "round trips" allowed within a given time frame and a maximum dollar amount for each exchange. After negotiating the discretionary frequent trading agreements, the sales group communicated the terms of the agreements to JCM's operations group to ensure that the approved frequent trading activity was timely processed and was not restricted as part of JCM's normal practice of monitoring and restricting market timing in Janus funds. By 2003, JCM's operations group—John Mari and others working under his supervision—began maintaining a list of approved discretionary frequent traders. By June 2003, the list included specific information about the agreements.

Certain of the seven Janus funds within which JCM approved discretionary frequent trading arrangements assessed redemption fees to offset bro-

kerage commissions and other costs associated with changes in the mutual funds' asset level and cash flow due to short-term trading. One fund assessed redemption fees from November 2001 through August 2003. Other funds assessed redemption fees beginning in March or June 2003. As part of the discretionary frequent trading arrangements, JCM waived redemption fees.

Certain members of JCM's senior management and certain portfolio managers knew about the discretionary frequent trading arrangements. In 2002, JCM employees prepared a "market timing report" that included information about these arrangements. A draft of this report was circulated in November 2002 to the following individuals:

- **Dave Agostine**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Former employee.
- **George W. Hagerman**: c/o Richard S. Vermeire, Perkins & Coie LLP, 1899 Wynkoop Street, Suite 700, Denver, CO 80202, (303) 291-2300. Former employee.
- **John M. Leuthold**: c/o Josiah O. Hatch, Ducker, Montgomery, Lewis and Aronstein, P.C., One Civic Center Plaza, 1560 Broadway, Suite 1400, Denver, CO 80202, (303) 861-2828. Former employee.
- **Ken Paieski**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee.
- **Russell Parker**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Con-

necticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Former employee.

- **Russ Shipman**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee.
- **Lars O. Soderberg**: c/o Richard W. Beckler, Howrey Simon Arnold & White LLP, 1299 Pennsylvania Avenue, N.W., Washington, D.C. 20004, (202) 783-0800. Former employee.
- **Mark B. Whiston**: c/o Peter J. Romatowski, Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001, (202) 879-3939. Former employee.

By July 2003, JCM stopped entering into discretionary frequent trading arrangements.

INTERROGATORY NO. 7:

Identify all persons who had positions as Officer, Director or employee at JCG who entered into or approved discretionary frequent trading arrangements.

RESPONSE TO INTERROGATORY NO. 7:

Janus objects to this Interrogatory as compound. Subject to and without waiving this objection and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 6.

INTERROGATORY NO. 7:

Identify all Independent Fund Employees who entered into or approved discretionary frequent trading arrangements.

RESPONSE TO INTERROGATORY NO. 7:

Janus objects to this Interrogatory as compound. Subject to and without waiving this objection and the General Objections set forth above, Janus states as follows:

There are no such persons.

INTERROGATORY NO. 8:

For each discretionary frequent trading arrangement referenced in the Mari Declaration, identify who at JCM, JCG or Janus Funds approved any such arrangement.

RESPONSE TO INTERROGATORY NO. 8:

Janus objects to this Interrogatory on the grounds that it is cumulative and duplicative. Subject to and without waiving this objection and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 6.

INTERROGATORY NO. 9:

For each discretionary frequent trading arrangement in the Mari Declaration, identify who at JCM, JCG or Janus Funds was informed about any such arrangement.

RESPONSE TO INTERROGATORY NO. 9:

Janus objects to this Interrogatory on the grounds it is cumulative and duplicative. Janus also objects to this Interrogatory as vague and ambiguous as to the phrases "discretionary frequent trading agreement in the Mari Declaration" and "was informed about." Subject to and without waiving these

objections and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 6.

INTERROGATORY NO. 10:

For each discretionary frequent trading arrangement referenced in the Mari Declaration, identify all documents that reflect any such arrangement.

RESPONSE TO INTERROGATORY NO. 10:

Janus objects to this Interrogatory on the grounds it is cumulative, duplicative, and unduly burdensome to the extent it calls for information that is already in the possession, custody, or control of Plaintiffs, and therefore the burden of deriving or ascertaining the answer is substantially the same for Plaintiffs as it is for Janus. Janus also objects to this Interrogatory as compound. Subject to and without waiving these objections and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 6.

INTERROGATORY NO. 11:

Identify all JCM personnel by names and title who were not JCG personnel who participated in drafting Janus Funds Prospectus sections on or discussions of market timing.

RESPONSE TO INTERROGATORY NO. 11:

Janus objects to this Interrogatory on the grounds that "participated in" is overbroad, vague, and ambiguous. Subject to and without waiving this objection and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 12:

Identify the persons that drafted the Janus Equity Funds Prospectus, dated February 28, 2003.

RESPONSE TO INTERROGATORY NO. 12:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 13:

Identify all facts that support your allegation that JCG shares did not trade in an efficient market.

RESPONSE TO INTERROGATORY NO. 13:

Janus objects to this Interrogatory to the extent it is based on the false assumption that Janus alleges that JCG shares did not trade in an efficient market. Janus does not allege that JCG shares did not trade in an efficient market.

INTERROGATORY NO. 14:

Identify names of all persons who filed Janus Fund Prospectuses with the SEC.

RESPONSE TO INTERROGATORY NO. 14:

Janus objects to this Interrogatory as unduly burdensome. Janus also objects to this Interrogatory as ambiguous as to time frame and overbroad as to the term "Janus Fund Prospectuses." Subject to and without waiving these objections and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 15:

For those persons identified in Interrogatory No. 12, identify exactly which Janus Fund Prospectuses they filed.

RESPONSE TO INTERROGATORY NO. 15:

Janus objects to this Interrogatory to the extent it is based on the false assumption that JCM personnel who "participated in drafting Janus Funds Prospectus sections on or discussions of market timing" necessarily filed Janus Fund Prospectuses. Subject to and without waiving this objection and the General Objections set forth above, Janus states as follows:

See Objections and Response to Interrogatory No. 1.

INTERROGATORY NO. 16:

Identify all persons and/or entities you refer to in your 11th affirmative defense (at para 151 of the Answer) who were not agents of Janus, or were acting outside of the scope of their responsibilities when engaging in the act or omission alleged in the SAC.

RESPONSE TO INTERROGATORY NO. 16:

Subject to the General Objections set forth above, Janus states as follows:

1. Canadian Imperial
2. Ikebana
3. Round Hill
4. Rydex
5. Shorewood LLC
6. Signalert

7. Thornberry

8. Trautman

9. Tripod LLC

10. The introducing or clearing brokers through which each of the foregoing entities traded.

INTERROGATORY NO. 17:

Identify all facts and documents that support your allegation that persons and/or entities you refer to in your 11th affirmative defense (at para 151 of the Answer) were not agents of Janus, or were acting outside of the scope of their responsibilities when engaging in the act or omission alleged in the SAC.

RESPONSE TO INTERROGATORY NO. 17:

Subject to the General Objections set forth above, Janus states as follows:

The nine discretionary frequent traders listed in response to Interrogatory No. 17, or the brokers through which they traded, were not acting as agents of Janus when they engaged in frequent trading in the seven affected Janus Funds.

INTERROGATORY NO. 18:

Identify all documents that that support your allegation that JCM management did not know that Janus or the Janus Funds had entered into discretionary frequent trading agreements or had other otherwise allowed for market timing in the Janus Funds.

RESPONSE TO INTERROGATORY NO. 18:

Janus objects to this Interrogatory to the extent it is based on the false assumption that Janus alleges that "JCM management did not know that Janus or

the Janus Funds had entered into discretionary frequent trading agreements or had other otherwise allowed for market timing in the Janus Funds." Janus does not make that allegation.

INTERROGATORY NO. 19:

Identify all documents that support your allegation that the Janus Funds drafted Janus Fund Prospectuses independent of any input from Janus officers or employees.

RESPONSE TO INTERROGATORY NO. 19:

Janus objects to this Interrogatory to the extent it is based on the false assumption that Janus alleges that "Janus Funds drafted Janus Fund Prospectuses independent of any input from Janus officers or employees." Janus does not make that allegation.

INTERROGATORY NO. 20:

Identify all facts that support your allegation that JCG's revenue did not depend on JCM's fees or revenues.

RESPONSE TO INTERROGATORY NO. 20:

Janus objects to this Interrogatory to the extent it is based on the false assumption that Janus alleges that "JCG's revenue did not depend on JCM's fees or revenues." Janus does not allege that JCG's revenue did not depend on JCM's fees or revenue.

INTERROGATORY NO. 21:

Identify all news articles or analysts reports that you are aware of that stated that Janus Fund Prospectuses were drafted independent of JCM.

RESPONSE TO INTERROGATORY NO. 21:

In response to a similar interrogatory, lead plaintiff stated that "research reports discussing [Janus] are identifiable through publicly available services." Plaintiffs' Response to Interrogatory No. 11. Outside counsel for Janus have undertaken a comprehensive search of such services, including Westlaw, Lexis, and Investext, and have identified all publicly available news articles and analyst reports referring to Janus during the putative class period. These documents, which speak for themselves, are listed on Exhibit A.

INTERROGATORY NO. 22:

Identify all persons who participated in enforcing the anti market timing restrictions, whether they were employees or officers of JCM, JCG, and/or Janus Funds.

RESPONSE TO INTERROGATORY NO. 22:

Janus objects to this Interrogatory as vague and ambiguous as to the terms "participated in" and "enforcing." Janus also reiterates its objection to Plaintiffs' definition of "anti market timing restrictions" as vague and ambiguous. Subject to and without waiving these objections and the other General Objections set forth above, Janus states as follows:

The following individuals were primarily responsible for detecting and deterring market timing:

- **John Mari**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee. Vice President, Global Strategy and Business Intelligence.

- **James Avery**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee. Director, Business Intelligence.
- **Frank Lao**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee. Vice President of Global Operations.
- **Marci Burgess**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee. Senior IT Business Analyst.
- **Tanette Schneider**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Former employee.
- **Doug Laird**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee. Vice President, Fund Services.
- **Scott Jones**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee. Manager, Global Systems Support and Analysis.
- **Steve Nasselrod**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Former employee.

Former Manager of Shareowner Operations.

- **Ron Smith**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Former employee. Former Systems Consultant.
- **Brad DiBattista**: c/o Mark A. Perry, Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, (202) 955-8500. Current employee. Managed Account Specialist.

INTERROGATORY NO. 23:

Identify all documents generated by employees of JCM, JCG or Janus Funds that discuss reasons for JCG common stock price declines in September 2003.

RESPONSE TO INTERROGATORY NO. 23:

Janus objects to this Interrogatory based on the parties' agreement to defer these issues. *See* Objections and Response to Request for Production of Documents No. 4.

INTERROGATORY NO. 24:

Identify all documents generated by persons not employees of JCM, JCG or Janus Funds, including documents generated by news media or securities analysts, that discuss JCG common stock price declines in 2003.

RESPONSE TO INTERROGATORY NO. 24:

Janus objects to this Interrogatory as unduly burdensome to the extent that it calls for information that is publicly available. *See also* Objections and Response to Interrogatory Nos. 22 and 24.

Dated: December 30, 2009

Respectfully submitted,

/s/ Mark A. Perry

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PETITIONER'S BRIEF

Supreme Court, U.S.
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No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

There is no aiding-and-abetting liability in private actions brought under Section 10(b) of the Securities Exchange Act of 1934. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Thus, a service provider who gives assistance to a company that makes a public misstatement cannot be held liable in a private securities-fraud action. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). In the decision below, however, the Fourth Circuit held that an investment adviser who allegedly "*helped* draft the misleading prospectuses" of a different company, "by *participating* in the writing and dissemination of [those] prospectuses," can be held liable in a private action "even if the statement on its face is *not* directly attributed to the [adviser]." Pet. App. 17a-18a, 24a (emphases added). The questions presented are:

1. Whether the Fourth Circuit erred in concluding that a service provider can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" another company's misstatements.

2. Whether the Fourth Circuit erred in concluding that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Craig Wiggins was a plaintiff in the district court. Mark B. Whiston, Loren M. Starr, and Gregory A. Frost were defendants in the district court.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONERS

Petitioners Janus Capital Group Inc. (JCG) and Janus Capital Management LLC (JCM) respectfully submit that the judgment of the court of appeals should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 566 F.3d 111. The opinion of the district court (Pet. App. 42a-53a) is reported at 487 F. Supp. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2009. A timely petition for rehearing was denied on June 2, 2009. Pet. App. 56a-57a. The Chief Justice extended the time in which to file a petition for a writ of certiorari to October 30, 2009. *See* No. 09A95. The petition was filed on that date and granted on June 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commis-

> sion may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities and Exchange Commission Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b), provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading[.]

STATEMENT

The operative complaint charges petitioners with securities fraud based on statements in prospectuses that petitioners did not issue, offering securities in which lead plaintiff did not transact. The district court dismissed the complaint for failure to plead an actionable claim. The court of appeals reversed, holding that a service provider that allegedly "helped draft the misleading prospectuses" of a different company can be sued for securities fraud "even if the statement on its face is not directly attributed to the defendant." Pet. App. 17a, 24a.

1. "As a check against abusive litigation" brought by private securities-fraud plaintiffs, "Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). The PSLRA "imposed heightened pleading requirements" on plaintiffs bringing private ac-

tions under Section 10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008); *see also Tellabs*, 551 U.S. at 313 ("Exacting pleading requirements are among the control measures Congress included in the PSLRA").

The PSLRA "requires plaintiffs to state with particularity ... the facts constituting the alleged violation." *Tellabs*, 551 U.S. at 313. The "complaint shall specify each statement alleged to have been misleading" and "the reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1). The statutory consequence for failing to meet this (and other) pleading requirements imposed by Congress for this particular type of lawsuit is mandatory dismissal. *See id.* § 78u-4(b)(3)(A) ("the court shall, on the motion of any defendant, dismiss the complaint if [the statutory pleading] requirements are not met").

Because Section 10(b) actions sound in fraud, the complaint must also "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Of course, even under the "ordinary" pleading requirements of Rule 8(a)(2), the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). That is, the complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

2. JCG is a publicly traded financial services company; JCM is a subsidiary of JCG that provides investment advisory and administrative services to mutual funds, including series of Janus Investment Fund—a separate legal entity that is not owned, gov-

erned, or controlled by JCG or JCM. *See* Pet. App. 5a. The operative second amended complaint contains the following material allegations.[1]

"Lead Plaintiff, First Derivative Traders, purchased [JCG] securities during the class period." Pet. App. 64a ¶ 15. JCG "is an asset management firm that launched mutual funds known as the 'Janus Funds.'" *Id.* at 59a ¶ 2. JCG "manages the Janus Funds through its wholly-owned subsidiary [JCM, which] serves as investment adviser to the Janus Funds, and, in that capacity is responsible for the funds' day-to-day operations." *Ibid.* "Defendants [JCG] and [JCM] are referred to herein collectively as 'Janus.'" *Ibid.*

"Janus represented that its mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans." Pet. App. 60a ¶ 5. "Certain investors, however, have attempted to use mutual funds to generate quick profits by rapidly trading in and out of certain mutual funds." *Ibid.* "[T]hese so-called 'market timers' ... take advantage of price inequities, but do so at the expense and to the detriment of long-term shareholders." *Ibid.* "Janus wrote and represented its policy against market timers." *Id.* at 69a ¶ 31.

"Defendants caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public." Pet. App. 60a ¶ 6.

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[1] Given the procedural posture, the non-conclusory factual allegations of the complaint are taken as true (*Iqbal*, 129 S. Ct. at 1949-50), and judicial review is limited to the well-pleaded allegations and a limited set of other documents. *Tellabs*, 551 U.S. at 322-23.

"These prospectuses, which are given to prospective shareholders, included language that said Janus' funds were 'not intended for market timing or excessive trading' and said 'Janus had measures in place to stop the trading.'" *Id.* at 72a ¶ 38. "These statements were materially false and misleading" because "Janus and its subsidiaries had, for years, entered into secret arrangements to allow several hedge funds to engage in market timing transactions in various Janus Funds." *Ibid.*

"On September 3, 2003, New York Attorney General Eliot Spitzer" charged a hedge fund "with secretly paying several mutual fund managers (including Janus) to allow [it] to engage in, *inter alia*, market timing trades in those mutual funds." Pet. App. 96a ¶ 86. "It was ... entirely foreseeable that the revelations concerning the secret market timing arrangements would have [a] material impact on [JCG's] common stock price." *Id.* at 106a ¶ 111.

Based on these allegations, lead plaintiff charged that both JCG and JCM violated Section 10(b) and Rule 10b-5 (Pet. App. 111a-114a ¶¶ 126-135), and further charged that JCG was liable for JCM's actions as a "control person" under Section 20(a) of the Exchange Act (*id.* at 115a-116a ¶¶ 136-140).

3. The district court dismissed the second amended complaint for failure to plead an actionable claim against either JCG or JCM. Pet. App. 43a-53a.

The district court emphasized that the operative complaint "contains no allegations that JCG actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it." Pet. App. 46a. Indeed, lead plaintiff "concede[d] as much, arguing that '[t]he fact that the prospectus statements were not specifically at-

tributed to defendants does not warrant dismissal.'" *Ibid.* (quoting opposition to motion to dismiss) (second alteration in original). The district court therefore concluded that "plaintiffs have not alleged facts sufficient to support their conclusory averment that JCG made a material misstatement or omission," as required by Rule 10b-5(b). *Id.* at 48a.

The district court found it unnecessary to "decide whether JCM made the alleged misstatements" because even "a mutual fund investment adviser that allegedly made representations to mutual fund shareholders cannot be liable under section 10(b) to its parent's shareholders who purchased no mutual fund shares." Pet. App. 50a n.5, 53a. That is so, the district court explained, because an investment adviser "owe[s] no duty to its parent's shareholders because the latter never purchased or sold ... mutual funds." *Id.* at 50a; *see also id.* at 53a n.7 (noting "the dispositive legal issue that JCM owed no duty to JCG shareholders under the circumstances of this case").

4. The court of appeals reversed, ruling that JCM could be held liable for "helping" to draft allegedly misleading statements in the prospectuses of another company even though the statements were not attributed to JCM. Pet. App. 17a-31a.

The Fourth Circuit first held that, "although the individual fund prospectuses are unattributed on their face, the clear essence of plaintiffs' complaint is that JCG and JCM *helped* draft the misleading prospectuses." Pet. App. 17a (emphasis added). The court concluded that four passages in the operative complaint, "taken together, allege that JCG and JCM, by *participating* in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 17a-18a

(citing *id.* at 60a ¶¶ 5-6, 69a ¶ 31, 109a ¶ 122) (first emphasis added).

The Fourth Circuit next considered "whether these statements were sufficiently attributable to JCG and JCM." Pet. App. 18a-19a. Declining to follow the decisions of other circuits, the Fourth Circuit concluded that "a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly *infer* that interested investors would have known that the defendant was responsible for the statement at the time it was made, *even if the statement on its face is not directly attributed to the defendant*." *Id.* at 23a-24a (emphases added; citations omitted). The court held that this newly created standard was satisfied as to JCM because "interested investors would have *inferred* that if JCM had not itself written the policies in the Janus fund prospectuses regarding market timing, it must at least have approved these statements." *Id.* at 31a (emphasis added).[2]

SUMMARY OF ARGUMENT

In the PSLRA, Congress both "ratified" prior decisions implying a private right of action to enforce Section 10(b) and Rule 10b-5 and precluded further judicial expansion of that right. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S.

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[2] The Fourth Circuit concluded that "plaintiffs' allegations of attribution ... are insufficient to reach JCG" (Pet. App. 32a) and therefore that JCG could be held liable only as a "control person" of JCM under Section 20(a) of the Exchange Act. Pet. App. 38a-40a. Because such liability may be imposed only when the controlled person has itself violated the Exchange Act (*id.* at 36a), JCG's liability is dependent on JCM's. Accordingly, the remainder of this brief focuses on JCM.

148, 165-66 (2008). The decision below, which expands the private right to sweep in contractual service providers to an issuer in whose prospectuses the alleged misstatements appear, transgresses this limitation.

I. JCM, which provides investment advisory services to mutual funds pursuant to contract, is a secondary actor with respect to statements in the mutual funds' prospectuses.

A. Because there is no aiding-and-abetting liability in private actions under Section 10(b) and Rule 10b-5, "secondary actors" cannot be held liable in such suits unless "*all* of the requirements for primary liability ... are met." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). Where liability is premised on alleged misstatements in a prospectus, the primary actors are the issuer of the securities and certain of its employees. All other persons or entities "who provide services" to the issuer in connection with the offering, regardless of the nature and extent of those services, are secondary actors. *Id.* at 188.

B. Both lead plaintiff and the government have suggested that investment advisers should be treated differently from other service providers, arguing that investment advisers are "essentially ... corporate insider[s]" of the mutual funds they advise. U.S. Cert. Br. 9. Congress has said otherwise: The relationship between mutual funds and their investment advisers is governed by a comprehensive statutory scheme that includes numerous provisions to ensure that the adviser and funds—which are related only by contract—remain independent. *See Burks* v. *Lasker*, 441 U.S. 471, 482-83 (1979); *Jones*

v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422-23 (2010).

The obligation to register mutual fund securities is imposed on the issuing mutual funds, not the separate investment adviser. The mutual fund prospectuses at issue in this case were all approved by the Board of Trustees of the Janus Funds. The offering documents expressly recite that they are filed on behalf of the Funds, not the adviser, and make clear that all expenses incurred in complying with the securities laws—including prospectus preparation—remain the responsibility of the Janus Funds.

An "investment adviser exception" is, moreover, unnecessary to the effective operation of the securities laws. Congress expressly provided for the liability of investment advisers in a different statute. And the Exchange Act deals with the liability of secondary actors, including those who "control" a primary actor who violates the securities laws. Although the government intimates (incorrectly) that JCM controlled the Janus Funds, no such allegation appears in the operative complaint, and the district court has already precluded additional amendments.

II. JCM, as a secondary actor, cannot be held primarily liable for unattributed statements made by another company in that company's prospectuses. The complaint was properly dismissed because it does not adequately allege either that JCM *made* the alleged misstatements or that the statements were directly attributed to it, which is a necessary predicate for presumed *reliance*.

A. The statements in the Janus Funds' prospectuses were made by the Funds, not by JCM.

1. The complaint does not contain factual allegations from which a reasonable factfinder could conclude that JCM made the statements in the prospectuses of the Janus Funds. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). The complaint identifies just two "representations" that JCM is alleged to have been responsible for, but there is no allegation that JCM made these representations *in the mutual fund prospectuses*. Those documents describe JCM, in the third person, as a service provider to the Funds, and contain no indication that JCM made any of the statements therein. Indeed, lead plaintiff has all but conceded the inadequacy of its own complaint—its *third* effort to plead PSLRA-compliant claims against JCM.

The Fourth Circuit held only that the "essence" of the complaint was that JCM "helped draft the misleading prospectuses" and, "by participating in the writing and dissemination of the prospectuses, made the misleading statements contained in the documents." Pet. App. 17a-18a (emphasis omitted). This holding is flatly inconsistent with *Central Bank* and *Stoneridge*: There is no private liability for "helping" (*i.e.*, aiding) another company. Nor is there private liability for "participating" in another company's activities; to the contrary, this is a form of secondary liability that Congress has authorized only the SEC—and not private plaintiffs—to pursue. 15 U.S.C. § 78t(e).

2. Rather than try to defend the Fourth Circuit's decision on its own terms, both the government and lead plaintiff have proffered expansive definitions of "making" in an effort to salvage the result below.

This effort should be rejected as inconsistent with *Stoneridge*.

The government argues that a service provider "makes" a statement if it "creates" the statement or "causes it to be made." This construction is supported by no authority and has been roundly rejected by the lower courts. It is inconsistent with the text of Section 10(b) and the structure of the Exchange Act—indeed, in other provisions Congress has expressly distinguished between "make" and "cause to be made." 15 U.S.C. § 78r. Moreover, Rule 10b-5(b)—the only provision at issue here—is narrower than Section 10(b) and reaches only those who "make any untrue statement." Just as the President rather than his speechwriters "makes" a speech, an issuer rather than its service providers "makes" the statements in the prospectus.

Lead plaintiff argues that a service provider "makes" a statement by "participating in its preparation, filing, and dissemination." This alternative construction—in addition to being unsupported by the allegations of the complaint—suffers from the same flaws as the government's. "Participation" is a signifier of secondary action, and a service provider cannot be held primarily liable for assisting another company with its public statements. The challenged statements were made by the Janus Funds, on whom the statutory obligation was imposed, not JCM.

B. Even if JCM could be said to have made the challenged statements in the Janus Funds' prospectuses, the complaint does not adequately plead reliance because the statements were not directly attributed to JCM.

1. This Court has held that reliance on "public material misrepresentations" may be presumed. *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988). To invoke this fraud-on-the-market presumption, a private plaintiff must plead and prove that *the defendant* made a public misrepresentation, as this Court confirmed in both *Central Bank* and *Stoneridge*. Thus, the Court has applied the presumption only to express speakers while declining to extend it to reach unidentified sources of information. Under that framework, cases against secondary actors cannot proceed on a fraud-on-the-market theory.

2. If the *Basic* presumption could be invoked in cases against secondary actors, it would only be where the secondary actor's role was contemporaneously disclosed to the market—as where a statement is directly attributed to someone other than the issuer. The majority of the courts of appeals have recognized that direct attribution is a prerequisite to presuming reliance in cases against secondary actors. "Absent attribution, plaintiffs cannot show that they relied on defendants' *own* false statements, and participation in the creation of those statements amounts, at most, to aiding and abetting securities fraud." *PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 148 (2d Cir. 2010). The understanding of market participants that a secondary actor may be at work "behind the scenes" is insufficient to support a presumption of reliance. *Id.* at 155.

The Fourth Circuit recognized that attribution is necessary, but concluded that market participants would "infer" that an investment adviser is the source of statements in mutual fund prospectuses. This inferential reasoning is at odds with the structure of the mutual fund industry. More fundamen-

tally, Congress has authorized the use of inferences to plead only one element of a private Rule 10b-5 action—scienter—and thus the factual predicates of all other elements, including reliance, must be pleaded with particularity. Permitting an attenuated inference of presumed reliance usurps "the federal lawmaker's prerogative ... to allow, disallow, or shape the contours of—including the pleading and proof requirements for—[Section] 10(b) private actions." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007).

Stoneridge held in no uncertain terms that the private right of action under Rule 10b-5 may not be expanded by courts, because adjustments to the liability regime under the federal securities laws are committed to Congress. The decision below is incompatible with *Stoneridge* and should be reversed.

ARGUMENT

The Securities Exchange Act of 1934 does not expressly provide a private right of action for alleged violations of Section 10(b). This Court, however, "has found a right of action implied in the words of the statute and its implementing regulation," the SEC's Rule 10b-5. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (citing *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)). This case involves only subsection (b) of that Rule, under which it is unlawful to "make any untrue statement" in connection with the purchase or sale of securities. 17 C.F.R. § 240.10b-5(b); *see also* note 8, *infra*.

The implied right previously recognized under Section 10(b) and Rule 10b-5 incorporates two distinctions that were misapplied by the court below: *first*, the Court and Congress have distinguished

primary from secondary *actors*; and *second*, the Court and Congress have distinguished primary from secondary *violators*. These distinctions are critically important because the private right of action under Section 10(b) does not reach *any* secondary violations, and thus reaches secondary actors only when "*all* of the requirements for primary liability under Rule 10b-5 are met." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994); *see also Stoneridge*, 552 U.S. at 158 ("The conduct of a secondary actor must satisfy each of the elements or preconditions for liability").

JCM is neither a primary actor nor a primary violator with respect to the statements challenged by lead plaintiff, which appear in prospectuses of a separate company offering securities that lead plaintiff did not purchase or sell. JCM is not a primary actor because it did not issue the securities offered by those prospectuses; rather, JCM provided investment advisory services to the issuer pursuant to contract. It is therefore a secondary actor. And as such, JCM cannot be held primarily liable under Rule 10b-5(b) because the operative complaint does not competently allege either that JCM "made" the statements in question or that the statements were directly and contemporaneously "attributed" to JCM. A "material misrepresentation ... by the defendant" and "reliance upon [that] misrepresentation" are essential elements of lead plaintiff's claim (*Stoneridge*, 552 U.S. at 157), and its inability to plead these elements is therefore fatal. *Central Bank*, 511 U.S. at 191-92; *see also Stoneridge*, 552 U.S. at 157-58.

The Fourth Circuit's contrary decision expands the implied right of action to a new class of defendants—contractual service providers to issuers—and

gives unprecedented breadth to both the "making" and "reliance" elements of the private right of action. In the PSLRA, however, "Congress ... ratified the implied right of action [under Section 10(b)] after the Court moved away from a broad willingness to imply private rights of action." *Stoneridge*, 552 U.S. at 165. "It is appropriate," *Stoneridge* held, "to assume that when [the PSLRA] was enacted, Congress accepted the [Section] 10(b) private cause of action as *then defined* but chose to extend it *no further*." *Id.* at 166 (emphases added). The decision below is irreconcilable with that adjudicative approach.

The court of appeals' judgment should be reversed and the district court's judgment of dismissal with prejudice reinstated.

I. INVESTMENT ADVISERS ARE SECONDARY ACTORS WITH RESPECT TO STATEMENTS IN PROSPECTUSES ISSUED BY THEIR MUTUAL FUND CLIENTS

The alleged misstatements in this case were contained in prospectuses that lead plaintiff did not read, issued by a company that lead plaintiff did not sue, offering securities that lead plaintiff did not purchase or sell. JCM, a contractual service provider to the issuer, is in every sense a secondary actor with respect to the challenged statements.

A. SERVICE PROVIDERS ARE SECONDARY ACTORS

In a prospectus-liability case—that is, where as here a Rule 10b-5 fraud claim is premised on alleged misstatements (or omissions) in a prospectus, registration statement, or other offering document—the universe of primary actors is limited to the issuer and certain of its employees. All others involved in

the offering, including the range of contractual advisers who assist issuers—financial advisers, legal advisers, and so forth—are secondary actors. *See, e.g.*, *PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 148 n.1 (2d Cir. 2010).

1. In *Central Bank*, this Court held that "a private plaintiff may not maintain an aiding and abetting suit" under Section 10(b) and Rule 10b-5. 511 U.S. at 191. The Court emphasized that "the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act." *Id.* at 177. "The proscription does not include," however, "giving aid to a person who commits a manipulative or deceptive act." *Ibid.* Accordingly, "secondary actors," including "lawyer[s], accountant[s], [and] bank[s]," cannot be held liable in a private Rule 10b-5 action unless "*all* of the requirements for primary liability ... are met." *Id.* at 191.

The SEC and the plaintiffs' bar responded to *Central Bank* by urging Congress to permit private aiding-and-abetting suits, but Congress declined those entreaties. *See Stoneridge*, 552 U.S. at 158; *see also, e.g.*, S. Rep. No. 104-98, at 19 (1995) ("The Committee believes that amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to [the PSLRA's] goal of reducing meritless litigation"); H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (discussing "the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability").

While it chose not to allow private suits against aiders and abettors, Congress *did* authorize the SEC to bring enforcement actions against such persons.

Yet it did so not by amending Section 10(b), but rather by amending Section 20—a provision that also imposes secondary liability on "controlling person[s]" of primary violators. *Central Bank*, 511 U.S. at 184. Section 20(e), added by the PSLRA, provides that, in SEC enforcement actions, "any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter ... shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." 15 U.S.C. § 78t(e). It is therefore clear that Congress knows how to impose liability on secondary actors when it so chooses. *Central Bank*, 511 U.S. at 184 ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere").

Having failed before Congress, private plaintiffs tried to "sidestep *Central Bank* by re-casting aiding and abetting claims as primary violations." Edward Brodsky, *Aiding and Abetting*, N.Y.L.J., June 8, 1994, at 3. That effort culminated in *Stoneridge*, where this Court reaffirmed *Central Bank*'s holding that "[t]he [Section] 10(b) implied private right of action does not extend to aiders and abettors." 552 U.S. at 158. Instead, the Court reiterated, "[t]he conduct of a secondary actor must satisfy each of the elements or preconditions for liability." *Ibid.*

Stoneridge observed that Congress's decision to amend the Exchange Act to "authoriz[e] [aiding-and-abetting liability] in actions brought by the SEC but not by private parties" further "supports the conclusion that there is no liability." 552 U.S. at 162-63. Although the plaintiffs' "view of primary liability makes any aider and abettor liable under [Section]

10(b) if he or she committed a deceptive act in the process of providing assistance," the Court noted that this "construction of [Section] 10(b) ... would revive in substance the implied cause of action against all aiders and abettors except those who committed no deceptive act in the process of facilitating the fraud." 552 U.S. at 162-63. Such an approach "would undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants." *Id.* at 163.

Congress has turned aside periodic attempts to undo *Central Bank* and *Stoneridge* and give private plaintiffs authority to sue aiders and abettors. *See, e.g.*, 155 Cong. Rec. S8501, S8557, S8564 (July 30, 2009). Indeed, the most recent Congress considered an amendment to Section 20(e) that would have authorized a private right of action against "any person that knowingly provides substantial assistance to another person in violation of this title." 156 Cong. Rec. S3569, S3618 (May 12, 2010) (introducing amendment); *see also* 156 Cong. Rec. S3385, S3399-S3400 (May 7, 2010) (statement of Sen. Specter); 156 Cong. Rec. S3663, S3670 (May 13, 2010) (statement of Sen. Specter). That amendment did not pass; instead, Congress directed the Comptroller General to "conduct a study on the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws," including "a review of the role of secondary actors in companies[']] issuance of securities." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Z, 124 Stat. 1376, 1871 (2010).

2. In *Central Bank*, this Court held that "those who provide services to participants in the securities

business"—including "lawyer[s], accountant[s], and bank[ers]"—are "secondary actors." 511 U.S. at 188, 189, 191. And *Stoneridge* made clear that the non-issuer defendants before the Court—customers and suppliers of an issuer—were "secondary actors." 552 U.S. at 166. Relying on *Central Bank* and *Stoneridge*, the lower courts have correctly applied the prohibition on aiding-and-abetting liability to *all* persons and entities other than the issuer and certain of its employees. *See PIMCO*, 603 F.3d at 148 n.1 ("We use the term 'secondary actor' to refer to lawyers ... , accountants, or other parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud").

The Dodd-Frank Act—Congress's most recent action in this area—expressly distinguishes between "secondary actors" and "companies" that "issu[e] ... securities." Dodd-Frank Act § 929Z; *see also* 155 Cong. Rec. S8501, S8564 (July 30, 2009) (statement of Sen. Specter) (distinguishing between "stock issuer[s]" and "'secondary actors'" such as an issuer's "auditors, bankers, business affiliates, and lawyers"). "[T]he [academic] literature," similarly, "uses the term 'secondary actor' to refer to all entities or individuals who are not direct issuers of securities." The Supreme Court 2007 Term, Leading Cases, *Scope of Secondary Actor Liability*, 122 Harv. L. Rev. 485, 485 n.3 (2008); *see also, e.g.*, Thomas Wardell, *The Current State of Play Under the Sarbanes-Oxley Act of 2002*, 28 N.C. J. Int'l L. & Com. Reg. 935, 950 (2003) (referring to "the auditors, the investment banks, the lawyers, the investment advisors, the financial advisors, and others" as secondary actors); Taavi Annus, Note, *Scheme Liability Under Section 10(b) of the Securities Exchange Act of 1934*, 72 Mo. L. Rev. 855, 858 n.25 (2007) ("[t]he term 'secondary actor' ... usu-

ally denotes any actor who did not issue the security in question").

This distinction between issuers and non-issuers reflects the fact that the Securities Act of 1933 and the Securities Exchange Act of 1934 impose disclosure and other obligations primarily on issuers, not service providers. *See* Louis Loss *et al.*, *Securities Regulation* 152, 281-82, 357-60 (4th ed. 2009); *see also, e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976). Service providers, by contrast, are subject to a variety of *other* liability regimes under both federal and state law. *See, e.g.*, *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 156 (2d Cir. 2007) ("Congress knows how to impose duties on accountants, and expose them to liability, when it wants to do so"); *cf. Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 478 (1977).

The bright-line distinction between issuers and non-issuers also serves the critical goal of fostering "'certainty and predictability'" in an area of law that cannot tolerate "decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Central Bank*, 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). For this reason, the nature and extent of duties contracted out to a service provider is irrelevant to the Rule 10b-5 analysis. As this Court warned in *Central Bank*, "'a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" 511 U.S. at 188 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975)).

B. Investment Advisers Are Service Providers

Lead plaintiff does not take issue with "the existing body of authority that holds that in most ordinary situations, outside professionals and service providers are not responsible to investors for misleading statements in an issuer's public filings." BIO 22. Lead plaintiff has asserted, however, that an exception should be made for investment advisers because they "handl[e]" certain "operations" of their mutual fund clients. *Id.* at 2, 21. The government has likewise suggested that "investment advisers are materially unlike outside service providers such as law firms and accounting firms" and are instead "essentially ... corporate insiders." U.S. Cert. Br. 9, 22 n.10.

Any suggestion that the Court should endorse an "investment adviser exception" to the distinction between primary and secondary actors has a number of fatal flaws. Most fundamentally, since no such exception had been recognized when the PSLRA was enacted in 1995, the interpretive methodology of *Stoneridge* precludes judicial creation of such an exception now. Adjustments to the private liability regime are for Congress, not the courts. *Stoneridge*, 552 U.S. at 165.

In contrast to the government's litigating position that investment advisers are indistinguishable from their mutual fund clients, the SEC in its regulatory capacity has recognized that "the investment adviser is separate and distinct from the fund it advises, with primary responsibility and loyalty to its own shareholders." *Role of Independent Directors of Investment Companies*, SEC Release No. 33-7932, 66 Fed. Reg. 3734, 3735 (Jan. 16, 2001). Indeed, in-

vestment advisers are identical to all other recognized secondary actors in the only respect that matters under this Court's cases: They are not issuers or employees of issuers. *See PIMCO*, 603 F.3d at 148 n.1.[3]

1. The Investment Company Act of 1940 (ICA) and the Investment Advisers Act of 1940 (IAA) comprehensively regulate the fund-adviser relationship and contain numerous provisions to ensure that the adviser and funds remain independent. *See Burks* v. *Lasker*, 441 U.S. 471, 482-83 (1979). The relationship between these separate companies is governed by a written contract that must, by law, be approved by the independent directors of the funds and their shareholders. 15 U.S.C. § 80a-15(a), (c). This Court has heretofore emphasized the statutorily required *independence* between funds and their adviser. *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422-23, 1427 (2010).

The 1940 Acts reflect Congress's deliberate decision not to require "compulsory internalization of the management function." *Burks*, 441 U.S. at 483. Congress could have required mutual funds to be internally managed, in which case the adviser would indeed be an "insider" of the funds. Congress elected

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[3] Of course, an investment adviser could issue its own securities, and it would be a primary actor with respect to statements in the offering materials for those securities. Lead plaintiff, however, does not challenge any statements made in connection with securities issued by JCM's parent, JCG—the only securities that lead plaintiff purchased or sold. *See* Pet. App. 44a-45a n.2. Rather, lead plaintiff challenges statements in the prospectuses for securities issued by the Janus Funds—securities that JCM did not issue, and that lead plaintiff did not purchase or sell. *Ibid.*

not to do so, however, instead allowing separate companies to advise mutual funds pursuant to contract. *See Jones*, 130 S. Ct. at 1422 (investment adviser is "separate entity" from mutual fund). This congressionally authorized structure, which has been adopted by the overwhelming majority of mutual fund complexes with the SEC's knowledge and approval, cannot be disregarded without dismantling the regulatory structure established by the 1940 Acts.[4]

a. The obligation to prepare and file the registration statement and other offering materials is imposed by the ICA on the entity that issues shares for sale to the public—the registered investment company—not the separate investment adviser. *See* 15 U.S.C. § 80a-8(b); *see also id.* § 80a-3(a)(1) (defining "investment company" as "any issuer" that (among other things) is "engaged primarily ... in the business of investing, reinvesting, or trading in securities").

To discharge their registration obligation, mutual funds file Form N-1A with the SEC, which includes the prospectus and statement of additional information (SAI) for a given period. *See Registra-*

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[4] The government's suggestion that JCM (a Delaware limited liability company) should be considered a "corporate inside[r]" of Janus Investment Fund (a Massachusetts business trust) also contravenes this Court's admonition to respect the corporate form. *See United States* v. *Bestfoods*, 524 U.S. 51, 63-64 (1998). Such state-law distinctions are applicable in federal securities cases (*see Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)), and lead plaintiff expressly represented to the district court that "[w]e don't have to pierce the corporate veil here." J.A. 492a; *see also* Pet. App. 71a ¶ 34 ("each mutual fund is ... its own company"). There is no basis for any attempt to disregard the legal separateness of the Janus Funds and JCM.

tion Form Used by Open-End Management Investment Companies, SEC Release No. 33-7512, 63 Fed. Reg. 13,916 (Mar. 13, 1998). These documents are typically prepared by legal counsel to the funds, who may be compensated by the adviser. *See Implementation of Standards of Professional Conduct for Attorneys*, SEC Release No. 33-8186, 68 Fed. Reg. 6296, 6302 (Feb. 6, 2003) ("such an attorney, though employed by the investment adviser rather than the investment company, is providing legal services for the investment company," and "the logical implication of that fact" is "that the attorney employed by the investment adviser is accordingly representing the investment company"). The offering documents must be approved by the funds' boards of trustees, which have ultimate governance responsibility for the funds. *See* Laurin Blumenthal Kleiman & Carla G. Teodoro, *Forming, Organizing and Operating a Mutual Fund—Legal and Practical Considerations*, in *The ABCs of Mutual Funds 2009*, at 18, 22 (PLI).

The SEC has recognized in various contexts that the responsibility for mutual funds' offering documents rests with the funds, not investment advisers. *See Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings*, SEC Release No. 33-8408, 69 Fed. Reg. 22,300 (Apr. 23, 2004) ("requir[ing] open-end management investment companies [*i.e.*, mutual funds] to disclose [a variety of information about market timing] in *their* prospectuses" (emphasis added)). Commentators, likewise, recognize that disclosure obligations rest with the registrant—the trust comprising mutual fund series—and not with the investment adviser. *See* 3 Tamar Frankel & Ann Taylor Schwing, *The Regulation of Money Managers: Mutual Funds and Advisers* § 24.02[A], at 24-34 (2d ed. 2010). This is consistent

with the Securities Act of 1933, which imposes filing and disclosure obligations on the registrant of securities, not contractual service providers. *See* 15 U.S.C. § 78*l*(b).

b. The mutual fund prospectuses at issue in this case were all reviewed and approved by the Board of Trustees of the Janus Funds. *In re Lammert*, Initial Decision Release No. 348, 93 SEC Docket 422, 430 (Apr. 28, 2008), *available at* http://www.sec.gov/litigation/aljdec/2008/id348cff.pdf. There is "no question that six of seven of the Janus fund trustees are not 'interested' within the meaning of the ICA." *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 873, 879 (D. Md. 2005). This exceeds the statutory requirements for independence from the adviser (*see* 15 U.S.C. § 80a-10(a)), and both the Janus Funds and the Independent Trustees at all relevant times had separate outside legal counsel. Lead plaintiff has never disputed that the Board of Trustees is legally and factually independent from JCM. Indeed, while the complaint alleges that JCM is "responsible for the funds' *day-to-day management*" (Pet. App. 59a ¶ 2 (emphasis added)), the Board of Trustees remains responsible for establishing the strategic direction of the Janus Funds and all matters related to corporate governance, including registering the Funds' securities for sale. *See* 15 U.S.C. § 80a-24(a).

The registration statements in this case expressly recite that they are filed "[o]n behalf of" the Janus Funds—not JCM. J.A. 166a. The stated purpose of the filing is to "update the financial information of the Trust [*i.e.*, the Funds]" (*ibid.*), and the prospectuses contained in the filing refer to the "*Funds*' Statement of Additional Information." *Id.* at 403a (emphasis added). These materials also make

clear that the Janus Funds—not JCM—bear the "costs of preparing, printing and mailing the *Funds'* Prospectuses and SAI to current shareholders and other costs of complying with applicable laws regulating the sale of Funds shares." *Id.* at 225a (emphasis added).

Although the Janus Funds have retained JCM by contract to perform certain management functions, those functions do *not* include preparing or filing the prospectus and other offering documents, for which the Funds expressly remain responsible. *See* J.A. 225a; *see also, e.g.*, 15 U.S.C. § 80a-24(a). Indeed, the investment advisory agreements in place during the class period (which are incorporated by reference in the complaint, Pet. App. 59a-60a ¶ 3) explain in detail the services to be performed by JCM, which do not include preparing registration statements. Add., *infra*, 1a-3a. The Janus Funds, by contrast, remain responsible for "all expenses incurred in complying" with the securities laws, including "the registration or qualification of shares of the Fund for sale" and "preparing, printing and mailing prospectuses and statements of additional information to Fund shareholders." *Id.* at 5a. The Funds are also obliged to "furnish JCM with ... copies of any financial statements or reports *made* to [the Funds'] shareholders or to any governmental body or securities exchange." *Id.* at 3a (emphasis added). The Janus Funds, not JCM, are thus responsible for the making of prospectus disclosures.

2. The "investment adviser exception" suggested by lead plaintiff and the government is not just unprecedented and unworkable, but also entirely unnecessary to the effective operation of the securities laws, which create a calibrated and interlocking ma-

trix of liability provisions, of which private class actions under Rule 10b-5 represent just one small part. *Cf. Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261-63 (1993).

The 1940 Acts contain broad provisions—including Section 206 of the IAA—prohibiting fraud and other misconduct by investment advisers. 15 U.S.C. § 80b-6; *see generally SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963). Indeed, the recent Dodd-Frank Act amended several of the ICA's and IAA's liability provisions. *See, e.g.*, Dodd-Frank Act §§ 929M, 929N. That Congress has directly and specifically addressed the liability of investment advisers makes it unnecessary to distort primary liability under Section 10(b) to reach them. *See Lattanzio*, 476 F.3d at 156; *cf. Pinter*, 486 U.S. at 650 ("When Congress wished to create such liability, it had little trouble doing so"). And that the 1940 Acts' liability provisions are, with an exception not relevant here, enforceable only by the SEC is further reason not to expand the private action under Rule 10b-5. *See Stoneridge*, 552 U.S. at 163.[5]

In addition to the adviser-specific liability provisions in the 1940 Acts, Congress dealt with the liability of secondary actors in the Exchange Act itself. The PSLRA added Section 20(e), which provides the

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[5] This enforcement authority is not "toothless." *Stoneridge*, 552 U.S. at 166. Indeed, the SEC has exercised its authority under the 1940 Acts to redress the allegations in this very case, requiring JCM to pay $100 million to investors (and funds) affected by discretionary frequent trading in the Janus Funds—investors who, unlike lead plaintiff, actually purchased or sold the securities offered by the challenged prospectuses. *See* J.A. 429a. The SEC did not proceed against JCM under Section 10(b).

SEC, but not private plaintiffs, authority to pursue those who provide substantial assistance to primary actors, and the Dodd-Frank Act recently broadened this authority to include secondary actors who "recklessly" provide such assistance. *See* Dodd-Frank Act § 929*O*. Such legislative adjustments to the Exchange Act's liability provisions preclude any need for judicial policymaking in this area. *Stoneridge*, 552 U.S. at 165-166.

Moreover, Section 20(a) imposes liability, including in private actions, on those who "control" a primary actor who violates the securities laws. 15 U.S.C. § 78t(a). In an appropriate case, an investment adviser (or any other contractual service provider) could be held liable as such a "control person." *Cf.* 17 C.F.R. § 240.12b-2 (noting that control can be exercised "by contract"). The potential availability of such congressionally authorized liability provides ample reason not to stretch Section 10(b) to reach the same class of defendants. *Central Bank*, 511 U.S. at 184.

The government repeatedly asserts that JCM "control[led]" the Janus Funds. U.S. Cert. Br. 12 ("respondent's complaint adequately alleged that JCM *controlled* the drafting and dissemination of the misleading prospectuses as one aspect of its general *control* over the Funds' affairs" (emphases added)); *see also id.* at 9, 10 & n.4, 13, 16; *cf.* BIO 23 (arguing that the investment adviser "control[s] all of the operations of the issuer"). The operative complaint, however, does not contain any such allegations. Indeed, lead plaintiff conceded in the court below that "replead[ing]" would be required "to add section 20(a) 'Control Person' claims against JCG and JCM for their role in controlling the activities of the funds."

Resp. C.A. Reply Br. 22 n.10. Lead plaintiff could not plead such a claim consistent with Rule 11—the Janus Funds are governed by an independent Board of Trustees, not "controlled" by JCM—but in any event the district court has squarely ruled that "there are not going to be any more amendments" in this case. J.A. 469a. Lead plaintiff "cannot switch horses mid-stream, changing its theory of liability at a later stage of the litigation in hopes of securing a swifter steed." *SEC* v. *Tambone*, 597 F.3d 436, 450 (1st Cir. 2010) (en banc).

* * *

The reticulated remedial scheme that Congress has enacted and revised over the years cannot be sidestepped by characterizing a secondary actor as a primary one. *See Stoneridge*, 552 U.S. at 166; *Central Bank*, 511 U.S. at 191. JCM did not issue the securities offered by the prospectuses in which the challenged statements appear, and therefore it is a secondary actor.

II. As a Secondary Actor, JCM Cannot Be Held Primarily Liable For Unattributed Statements Made By Another Company In Its Prospectuses

A secondary actor may be held to answer in a private securities-fraud suit only if "*all* of the requirements for primary liability under Rule 10b-5 are met" based on the secondary actor's *own* actions (and not those of some other person). *Central Bank*, 511 U.S. at 191. The elements of a private Rule 10b-5 claim are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss;

and (6) loss causation." *Stoneridge*, 552 U.S. at 157 (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-42 (2005)).

The operative complaint was properly dismissed in this case because lead plaintiff did not adequately allege either that JCM *made* the challenged statements in the Janus Funds' prospectuses or that the putative class of JCG investors *relied* on any statements attributed to JCM.

Although *Stoneridge* precludes liability theories that do not fit within the pre-1995 framework for private Rule 10b-5 actions, the Fourth Circuit was unable to cite a single decision from this Court (or, indeed, any court of appeals) supporting its holding on either of the two questions presented. *See* Pet. App. 18a (citing a single district court decision in support of its "making" holding); *id.* at 24a-25a (citing two district court decisions in support of its "attribution" holding). Likewise, in attempting to defend the Fourth Circuit's decision, neither lead plaintiff nor the government could cite a single appellate decision supporting their positions. *See* BIO 23 (citing the same two district court decisions for the proposition that "other courts had found the potential for liability on the part of professionals or service providers"); U.S. Cert. Br. 11 (citing no authority whatsoever for government's preferred construction of the "making" element); *id.* at 15 (same for government's proposed elimination of the "attribution" requirement).

It is therefore apparent that the Fourth Circuit made new law, but the federal courts no longer have license to extend the private right of action previously implied under Rule 10b-5 "beyond its present boundaries." *Stoneridge*, 552 U.S. at 165; *see also*

Morrison v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2881 & n.5 (2010). The Fourth Circuit's decision cannot be affirmed consistent with *Stoneridge*. *Cf.* J.K. Rowling, *Harry Potter and the Order of the Phoenix* 841 (2003) ("neither can live while the other survives").

A. The Challenged Statements Were Not Made By JCM

Lead plaintiff's contention that "the statements in the prospectuses regarding market timing were misleading" (Pet. App. 8a) requires it to plead (and prove) that JCM *made* the challenged statements. 17 C.F.R. § 240.10b-5(b). Lead plaintiff cannot meet its pleading (or proof) burden, however, because the statements in the Janus Funds' prospectuses were made by the Trust comprising the Janus Funds—a separate legal entity, with its own Board of Trustees and legal counsel—not by JCM.

1. The Complaint Does Not Adequately Allege "Making"

The complaint does not plead facts that, if proved, could lead a reasonable trier of fact to conclude that JCM "made" the challenged statements in the Janus Funds' prospectuses. To be sure, the complaint asserts that "defendants ... publicly issu[ed] false and misleading statements" (Pet. App. 109a ¶ 122), but this Court has held that such a "formulaic recitation" of an element of a cause of action, without factual support, "will not do." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). The remainder of the complaint does not provide the requisite factual support. *See Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). It does not satisfy Rule 8, much less the heightened requirements of Rule 9(b) and the PSLRA.

a. The operative complaint *nowhere* alleges that JCM made the challenged statements in the Janus Funds' prospectuses. It identifies just *two* "represent[ations]" that petitioners are alleged to have been responsible for: "Janus wrote and represented its policy against market timers" (Pet. App. 69a ¶ 31), and "Janus represented that its mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans" (*id.* at 60a ¶ 5). But there is no allegation that JCM made these "represent[ations]" *in the mutual fund prospectuses*, which are the only documents at issue.

Even accepting as true that JCM "represented" both "its policy against market timers" and that "its mutual funds were designed to be long-term investments," the complaint does not allege *where* (or *to whom*) such representations were made. It is entirely consistent with the contractual relationship between JCM and the Janus Funds for such representations to have been made by the investment adviser to the mutual funds. Any such representations, if reproduced or summarized by the Funds in *their* prospectuses, were "made" by the registrant, not JCM as service provider. *See* 15 U.S.C. § 80a-8(b) (requiring "[e]very registered investment company" to file a "registration statement ... containing [specified] information and documents" about fund policies). The preceding communications between the service provider and the issuer will not support a

private securities-fraud case. *See Stoneridge*, 552 U.S. at 161.[6]

Nothing in the Janus Funds' registration statements suggests that JCM was the source of any of the policies or other information contained in those documents. To the contrary, the offering documents describe JCM, in the third person, as a contractual service provider to the Funds, and summarize JCM's duties in that capacity—which do *not* include prospectus preparation. *See, e.g.*, J.A. 143a, 224a-225a; *see also* Part I.B.1.b., *supra*. As the documents themselves attest, the statements therein were made "[o]n behalf of the Trust [*i.e.*, the Funds]," not JCM. J.A. 166a.

Indeed, lead plaintiff has all but conceded that the operative complaint does not adequately allege that JCM made the challenged statements, resorting instead to materials not referenced in the complaint. *See, e.g.*, BIO 2; Resp. C.A. Br. 38. But the *pleading* requirements imposed by the PSLRA (15 U.S.C. § 78u-4(b)(1)-(2); *see also id.* § 78u-4(c)(1)) would be neutered by allowing a private Rule 10b-5 plaintiff to

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[6] Consider an automobile parts supplier that promulgates a written policy concerning quality control; if an automobile manufacturer (a separate company with which the supplier has a contractual relationship) reproduces the supplier's policy verbatim in a prospectus, the "maker" of the statement *in the prospectus* is the manufacturer, not the supplier. This is one of the reasons that the PSLRA requires private plaintiffs to "distinguish among those they sue and enlighten *each defendant* as to his or her particular part in the alleged fraud." *Southland Sec. Corp.* v. *INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 365 (5th Cir. 2004); *see also, e.g.*, *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (Rule 9(b) requires that plaintiff plead with particularity "the identity of the person making the misrepresentation").

avoid dismissal by reference to things outside the complaint. *See Teachers' Ret. Sys. of La.* v. *Hunter*, 477 F.3d 162, 172 (4th Cir. 2007) (the PSLRA "authoriz[es] the court to assume that the plaintiff has indeed stated *all* of the facts upon which he bases his allegation of a misrepresentation or omission").

The deficiency of the operative complaint is particularly glaring in light of the multiple opportunities the district court afforded lead plaintiff to amend its complaint. In fact, when the district court dismissed the first amended complaint for failure to plead loss causation in conformance with *Dura*, it specifically noted (but did not resolve) the "difficult issu[e]" whether JCM had "made" the statements in the Fund prospectuses. J.A. 159a & n.1. Lead plaintiff then sought and received leave to file yet another amended complaint (*id.* at 162a)—its *third* attempt to plead PSLRA-compliant claims—and the district court put no limitations on the scope of amendment. The second amended complaint, filed years after the events in question and after substantial discovery in related actions, includes 140 numbered paragraphs and incorporates by reference more than 70 documents. But despite being given three chances, lead plaintiff was unable to plead that JCM made the challenged statements.

b. The Fourth Circuit did not hold that the operative complaint adequately pleads that JCM *actually made* any of the prospectus statements at issue. Rather, the Fourth Circuit held that the "clear *essence* of [the] complaint is that JCG and JCM *helped* draft the misleading prospectuses," and that the complaint "allege[s] that JCG and JCM, by *participating* in the writing and dissemination of the prospectuses, *made* the misleading statements con-

tained in the documents." Pet. App. 17a-18a (emphases added). Merely quoting this holding should suffice to establish its inconsistency with *Central Bank* and *Stoneridge*.

There is no private liability for "helping" another company write its prospectuses. *Central Bank* held that "[a]ny person or entity ... who ... *makes* a material misstatement (or omission)" may be liable as a primary violator. 511 U.S. at 191 (emphasis added). The Court did not include those who "help" others to make a statement. Indeed, the term "help" is a classic signifier of *secondary* liability: "Help" is synonymous with "ai[d]" and "assist[ance]," words used by this Court to describe the conduct of secondary actors that is beyond the reach of the Rule 10b-5 private right of action. *See Central Bank*, 511 U.S. at 168, 191; *Stoneridge*, 552 U.S. at 162.

Nor is there private liability for "participating" in the writing of another company's statement. In *Stoneridge*, the Court granted certiorari to decide whether "an injured investor may rely upon [Section] 10(b) to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does *participate* in a scheme to violate [Section] 10(b)." 552 U.S. at 156 (emphasis added). The Court's "no" answer to that question cannot be reconciled with the Fourth Circuit's "yes" answer in this case. *See Regents* v. *CSFB*, 482 F.3d 372, 390 (5th Cir. 2007) ("The banks' participation in the transactions ... did not give rise to primary liability under [Section] 10(b)"); *see also Fidel* v. *Farley*, 392 F.3d 220, 235 (6th Cir. 2004).

If "participating" in writing another company's prospectus were sufficient for liability under Section 10(b), then the congressional response to *Central*

Bank—which conferred on the SEC but not private plaintiffs the authority to pursue those who provide "substantial assistance" to primary violators (15 U.S.C. § 78t(e))—would be rendered nugatory. *See Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 176 (2d Cir. 1998) (rejecting a "substantial participation" test for Rule 10b-5 liability). Instead, "[a]llegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms ... all fall within the prohibitive bar of *Central Bank*." *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997).

The en banc First Circuit recently and correctly observed that "[i]f *Central Bank*'s carefully drawn circumscription of the private right of action is not to be hollowed ... courts must be vigilant to ensure that secondary violations are not shoehorned into the category reserved for primary violations." *Tambone*, 597 F.3d at 446. The court below did not exercise such vigilance; to the contrary, by holding that JCM could be held liable for "help[ing] draft" or "participating in writing" another company's statements, the Fourth Circuit impermissibly authorized the very kind of secondary liability squarely precluded by *Central Bank* and *Stoneridge*.

2. "MAKING" CANNOT BE REDEFINED TO REACH THE ACTIVITIES OF SECONDARY ACTORS

At the certiorari stage, neither lead plaintiff nor the government was willing to defend the Fourth Circuit's holding that a service provider can be held primarily liable for securities fraud if it "helps" another company make a statement. Instead, their defenses of the decision below rest on expansive constructions of "making." Not only does this tactic run afoul of *Stoneridge*'s prohibition against extending

the private right of action, but the proposed definitions are also inconsistent with the text and structure of the statute and rule.

a. The government argues that a person "makes" a statement "when [that] person, acting alone or with others, *creates* a misrepresentation or *causes* it to be made." U.S. Cert. Br. 11 (emphases added). It is telling that the government cites *no* authority for its alternative definition of "make"—no statute or rule, no court decision, no dictionary, not even a snippet of legislative history. *See id.* at 11-12. That is because lower courts have refused to accept the government's *ipse dixit*, adhering instead to the text and structure of Section 10(b) and its implementing regulation. *See PIMCO*, 603 F.3d at 155 ("reject[ing] the creator standard" proposed by the SEC); *Tambone*, 597 F.3d at 438 ("reject[ing] the SEC's expansive interpretation" of "make"). This is also, of course, how this Court has approached similar questions. *Ernst & Ernst*, 425 U.S. at 199 (rejecting SEC's proposed construction that would "add a gloss to the operative language of the statute quite different from its commonly accepted meaning").

Section 10(b) makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security ... , any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j. Just as "the language of Section 10(b) does not in terms mention aiding and abetting" (*Central Bank*, 511 U.S. at 175), it likewise does not reach "creating" or "causing." In a prospectus-liability case, the only one "us[ing] or employ[ing]" *anything* is the issuer—the company that, through the prospectus, is offering its securities for

sale—and thus the issuer is the only one covered by Section 10(b).[7]

In other sections of the Exchange Act, Congress demonstrated that it knew perfectly well how to reach persons who "cause" a statement to be made. Section 18, for instance, "creates a private cause of action against persons, such as accountants, who '*make or cause to be made*' materially misleading statements in reports or other documents filed with the Commission." *Ernst & Ernst*, 425 U.S. at 212

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[7] The government might argue that its novel definition of "making" finds support in Section 10(b)'s phrase "directly or indirectly." *But see Central Bank*, 511 U.S. at 176 (rejecting a similar argument). As an initial matter, the placement of that phrase immediately before the jurisdictional nexus—rather than in the substantive portion of the statute—strongly suggests that it was included to reach "'indirect' use of the instrumentality of interstate commerce." *Harrison* v. *Equitable Life Assur. Soc.*, 435 F. Supp. 281, 284 (W.D. Mich. 1977). Thus, for instance, a defendant can be held liable for using a telephone to arrange a meeting at which it "use[s] or employ[s]" a misrepresentation, even though the misrepresentation was communicated in person rather than over the wires. *See Aquionics Acceptance Corp.* v. *Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974). Even assuming that "use or employ[ment]" could be indirect, however, an issuer often speaks to the market both directly and indirectly. It may speak to the market directly, as through SEC filings, and indirectly, such as by providing information to analysts "with the intent that the analysts communicate those statements to the market." *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002). But in the latter example, even though the analyst is the one speaking, it remains the issuer that is indirectly "us[ing] or employ[ing]" the information "in connection with the purchase or sale of any security." 15 U.S.C. § 78j. Not so with respect to service providers: If an issuer adopts language from a service provider in its public filings, it remains the issuer—and not the service provider—that is "making" the statement.

n.31 (quoting 15 U.S.C. § 78r) (emphasis added); *cf.* Pet. App. 60a ¶ 6 ("Defendants caused mutual fund prospectuses to be issued for Janus mutual funds"). Section 18 is stated in the disjunctive—"make *or* cause to be made"—which destroys the government's suggestion that one "makes" a statement merely by "causing" it to be made. *See Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings"). And thus if *Central Bank*'s focus on the statutory language "is to have any real meaning, a defendant must *actually make* a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting." *Wright*, 152 F.3d at 175 (emphasis added); *see also Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

In any event, even if the text of Section 10(b) could be stretched far enough to encompass the government's proposed "creator" standard, *Rule 10b-5(b)*—the only provision at issue here—cannot. Although "[t]he scope of Rule 10b-5 is coextensive with the coverage of [Section] 10(b)" (*SEC* v. *Zandford*, 535 U.S. 813, 816 n.1 (2002)), Rule 10b-5(b) is narrower than Rule 10b-5(a) and (c), and encompasses less than the full sweep of Section 10(b). *See Affili-*

ated Ute Citizens of Utah v. *United States*, 406 U.S. 128, 152-53 (1972).[8]

Rule 10b-5(b) reaches only those who "make any untrue statement." 17 C.F.R. § 240.10b-5(b). The SEC had the entire English language at its disposal in crafting this provision; its decision to limit the proscription to one very specific activity—"mak[ing] any untrue statement"—must be given effect. The accepted meaning of "make" in the context of "making a statement" is today, as it was when Rule 10b-5 was promulgated, "to put forth; give out; deliver; as to make a speech." *Reass* v. *United States*, 99 F.2d 752, 755 n.4 (4th Cir. 1938). That definition describes only the Janus Funds' issuance of the prospectuses—not any role that other actors, including JCM, might have had in the drafting process.

To be sure, "make" can sometimes mean "create"—as when one makes a sandwich. *See Tambone*, 597 F.3d at 443. But the government's attempt to graft that meaning onto Rule 10b-5(b) simply ignores the relevant context: "make *any untrue statement*." 17 C.F.R. § 240.10b-5(b) (emphasis added); *see Holloway* v. *United States*, 526 U.S. 1, 7 (1999) ("the

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[8] The district court dismissed lead plaintiff's claims under Rule 10b-5(a) and (c). *See* Pet. App. 48a ("although [an] alleged fraudulent scheme is mentioned as a background fact" in the operative complaint, lead plaintiff "do[es] not assert scheme liability on the part of defendants," "[n]or could [it] do so"). The Fourth Circuit left that ruling undisturbed. *Id.* at 35a-36a. Lead plaintiff did not challenge that dismissal at the certiorari stage and therefore may not do so now. S. Ct. R. 15.2; *see also, e.g.*, *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-16 (1985). In any event, lead plaintiff's claims implicate Rule 10b-5(b) rather than Rule 10b-5(a) or (c) because they are founded on "specific ... written statement[s]." *Stoneridge*, 552 U.S. at 158.

meaning of statutory language, plain or not, depends on context"). When "make [is] followed by a noun with the indefinite article," it is "often nearly equivalent to the verb intransitive corresponding to that noun; as, 'make a splash,' to splash, 'make a move,' to move, 'make a complaint,' to complain." *Webster's New International Dictionary* 1485 (2d ed. 1934). Similarly here, to "make [a] statement" is "to state."

Thus, when the President delivers a speech, we say that he *made* the speech—but it would stretch ordinary usage too far to say that the President's *speechwriters* made the speech. So, too, a registered issuer of securities "makes" the statements in the registration documents for those securities; a contractual service provider—even one that may have assisted or participated in the drafting process, as lawyers (for example) frequently do—is not a maker.

The government's proposed "creator" standard—which is designed to reach persons other than the "maker" of a statement—is thus nothing other than aiding-and-abetting liability with a new name. *See PIMCO*, 603 F.3d at 157 (government's "creator standard ... establishes no clear boundary between primary violators and aiders and abettors"). The Court closed the front door to such liability in *Central Bank*, and the back door in *Stoneridge*; the government's effort to sneak in the side door should meet with no more success.

b. Lead plaintiff contends that a service provider "make[s]" a statement "by participating in its preparation, filing and dissemination." BIO 1. In so doing, lead plaintiff rests its entire argument on the Court's observation that the suppliers in *Stoneridge* "had no role in preparing or disseminating" the allegedly false statements at issue in that case. 552

U.S. at 155. But the Court, in describing the *facts* of that case, did not purport to announce a legal rule that any role in preparing or disseminating false statements is sufficient to transform a service provider into a "maker" of those statements within the meaning of Rule 10b-5(b).

Preparation. The complaint does not allege that JCM prepared the challenged statements. In any event, for the same reason that the government is mistaken to argue that Section 10(b) and Rule 10b-5(b) reach "creating" or "causing" a statement, lead plaintiff is wrong that "prepar[ing]" a statement suffices for liability. A law clerk may "prepare" a draft judicial opinion, but only the judge "makes" the decision. *See also* Part II.A.2.a., *supra*.

Filing. Contrary to lead plaintiff's assertion in briefing, the operative complaint does not allege that JCM "filed" the Janus Funds' prospectuses—nor could it, since the filing obligation is imposed by statute on the registrant. *See* 15 U.S.C. § 80a-24(a); J.A. 278a. Congress has distinguished "filing" from "making," providing in the ICA that "[i]t shall be unlawful for any person to *make* any untrue statement ... filed or transmitted pursuant to th[e] [ICA]." 15 U.S.C. § 80a-33(b) (emphasis added). Service providers routinely handle the physical steps necessary for filing—in this Court, for instance, printers often arrange for delivery of briefs they print—but they do not "make" the statements in the filed documents. And it doubtless would come as a surprise to the courier who delivered this particular brief to the Court that he had thereby "made" this sentence.

Dissemination. As is common in the mutual fund industry (*see Tambone*, 597 F.3d at 439), distribution of the Janus Funds' securities and prospectuses was

handled by a registered broker-dealer, Janus Distributors LLC, which was not sued by lead plaintiff. *See* J.A. 371a. When lead plaintiff speaks of "dissemination," therefore, it means only that the prospectuses were made available on www.janus.com. *See* Pet. App. 72a ¶ 38. Both courts below correctly concluded that this is an insufficient basis to impose liability. *Id.* at 32a, 46a. As the en banc First Circuit has explained, "[a]llowing courts to imply that 'X' has made a false statement with only a factual allegation that he passed along what someone else wrote would flout a core principle that underpins the *Central Bank* decision." *Tambone*, 597 F.3d at 446. That irrefutable point disposes of lead plaintiff's dissemination theory.

* * *

The proponents of civil liability have offered a series of words—"helping," "participating," "creating," "causing," "preparing," "filing," and "disseminating"—to describe JCM's supposed role with respect to the challenged statements in the Janus Funds' prospectuses. What these words have in common is that none of them is found in the Rule that lead plaintiff seeks to enforce. Rule 10b-5(b) very specifically outlaws the "mak[ing]" of any false statement, but the complaint does not (and could not) allege that JCM made the statements at issue. Rather, the challenged statements in the Janus Funds' prospectuses were *made* by the Janus Funds—on whom the statutory obligation to register the securities offered by those documents was imposed, and on whose behalf they were filed.

B. The Challenged Statements Were Not Attributed To JCM

Even if the Court were to conclude that the operative complaint adequately alleges that JCM "made" the challenged statements, this case was properly dismissed by the district court because lead plaintiff failed to plead a legally sufficient theory of reliance. The challenged statements were not expressly attributed to JCM at the time they were made in the Janus Funds' prospectuses and, therefore, the reliance element is not satisfied.[9]

1. The *Basic* Presumption Does Not Reach The Activities Of Secondary Actors

In private securities-fraud suits, the plaintiff must plead *both* "a material misrepresentation or omission by the defendant" *and* "reliance upon the misrepresentation or omission." *Stoneridge*, 552 U.S. at 157 (citing *Dura*, 544 U.S. at 341-42).

The reliance requirement serves a critical function in separating primary liability from aiding-and-abetting liability. "Allowing plaintiffs to circumvent the reliance requirement" thus "would disregard the careful limits on [Rule] 10b-5 recovery mandated by [this Court's] cases." *Central Bank*, 511 U.S. at 180;

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[9] The government maintains that reliance is not an element in an SEC enforcement action. U.S. Cert. Br. 13. If the government is right, that is another reason why the SEC's views on the reliance element of private actions (including the attribution requirement) are entitled to no deference. *See Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.27 (1977). In addition, the government has identified no rule or other formal agency action to which deference could be given. *See United States* v. *Mead Corp.*, 533 U.S. 218, 229-31 (2001).

see also, e.g., *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996) ("The critical element separating primary from aiding and abetting violations is the existence of a representation ... made by the defendant, that is relied upon by the plaintiff").

Lead plaintiff does not allege that it *actually relied* on any statements made by JCM or JCG. It purchased and sold JCG equity stock, not shares of the Janus Funds, and does not claim to have reviewed the Funds' prospectuses before choosing to purchase or sell shares of another company's stock.[10]

In the absence of actual reliance, reliance may be (rebuttably) *presumed* in only two circumstances: where the defendant made a public misstatement regarding a security that trades in an efficient market, or where the defendant failed to disclose information

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[10] The fact that lead plaintiff did not transact in the securities offered by the prospectuses at issue also means it cannot establish that any misrepresentations in those prospectuses were "in connection with" its purchase or sale of JCG stock. *See* Pet. App. 49a n.4 (reserving judgment on this issue). A plaintiff may not "base its action on Rule 10b-5 ... without having either bought or sold the securities described in the allegedly misleading prospectus." *Blue Chip Stamps*, 421 U.S. at 727; *see also Morrison*, 130 S. Ct. at 2884. The reliance and "in connection with" requirements are directly linked: "Congress when it used the phrase 'in connection with the purchase or sale of any security' intended only that the device employed, whatever it might be, *be of a sort that would cause reasonable investors to rely thereon*, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc) (quoting 15 U.S.C. § 78j) (emphasis added). This Court has previously recognized the interrelated nature of the elements of a private Rule 10b-5 action. *See Stoneridge*, 552 U.S. at 160-61.

to the plaintiff despite a duty to speak. *Stoneridge*, 552 U.S. at 159 (citing, respectively, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988), and *Affiliated Ute*, 406 U.S. at 153-54). *Stoneridge* held that where neither of these presumptions applies, a private Rule 10b-5 class action must be dismissed for failure to satisfy the reliance element. 552 U.S. at 159. So, too, here.

Lead plaintiff has never sought to invoke the *Affiliated Ute* presumption, and for good reason: JCM owes no duty to JCG's shareholders to correct statements in the Janus Funds' prospectuses. Pet. App. 52-53 & n.7. In the absence of a duty to speak, there can be no presumed reliance under *Affiliated Ute*. *Stoneridge*, 552 U.S. at 159; *see also Chiarella* v. *United States*, 445 U.S. 222, 235 (1980) ("When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak").

The reliance element in this case, therefore, stands or falls on the *Basic* presumption. In *Basic*, a 4-2 decision in which no current Justice participated, this Court held that "an investor's reliance on any public material misrepresentations ... may be presumed for purposes of a Rule 10b-5 action." 485 U.S. at 247. Invoking the "hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company," the Court concluded that "[m]isleading statements will ... defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Id.* at 241-42 (internal quotation marks omitted). Because "the market ... transmits information to the investor in the processed form of a market price," an investor who buys or sells stock at the market price is presumed to

"d[o] so in reliance on the integrity of that price." *Id.* at 244, 247.

"[T]o invoke the [*Basic*] presumption," however, "a plaintiff must allege and prove" (among other things) "that *the defendant* made public misrepresentations." 485 U.S. at 248 n.27 (emphasis added); *see also id.* at 226 (presumption applicable to "the issuance of a materially misleading statement *by the corporation*" (emphasis added)). This focus on "the defendant" rather than some other person or entity is no accident: The entire presumption is based on "the incentive for investors to 'pay attention' to *issuers' disclosures*." *Id.* at 246 n.23 (emphasis added). Absent a misstatement made by the defendant to the public, a plaintiff cannot use the *Basic* presumption to show "reliance on *the defendant's* misstatement or omission." *Central Bank*, 511 U.S. at 180 (emphasis added); *see also Stoneridge*, 552 U.S. at 159 ("Reliance by the plaintiff upon *the defendant's* deceptive acts is an essential element of the [Section] 10(b) private cause of action" (emphasis added)).

In *Central Bank*, this Court's conclusion that the Rule 10b-5 private right of action does not extend to aiding and abetting was "confirmed by the fact that [a contrary holding] would impose ... liability when at least one critical element for recovery under [the implied right of action] is absent: reliance." 511 U.S. at 180. In an aiding-and-abetting suit, the Court noted, "the defendant could be liable without any showing that the plaintiff relied upon *the aider and abettor's* statements or actions." *Ibid.* (emphasis added).

Similarly in *Stoneridge*, this Court rejected primary liability because, even though the alleged misstatements were public, the defendants' role in those

misstatements was not. Scientific-Atlanta and Motorola "drafted [false] documents" that permitted Charter Communications to issue misleading financial statements. 552 U.S. at 154. But even though Scientific-Atlanta and Motorola had both engaged in "deceptive acts," this Court concluded that those acts were "too remote to satisfy the requirement of reliance" since they "were not disclosed to the investing public." *Id.* at 161. Charter's financial statements were indisputably public, but the plaintiffs could not "show reliance *upon any of respondents'* [*i.e.*, Scientific-Atlanta's and Motorola's] *actions*" because "[n]o member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times." *Id.* at 159 (emphasis added); *see also id.* at 166-67 ("the investors cannot be said to have relied upon any of *respondents'* deceptive acts in the decision to purchase or sell securities" (emphasis added)).

According to the Fourth Circuit, *Stoneridge* "has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." Pet. App. 32a. But the statements in *Stoneridge*—the issuer's financial results—*were* publicly disclosed; the question was whether the service provider whose involvement was not disclosed could be held liable for those statements. 552 U.S. at 154-55. As *Stoneridge* recognized, the issue under *Basic* is whether *the defendant* made public misstatements, not whether the statements were made in the public sphere. *See Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 369 (4th Cir. 2004).

This Court has never suggested that the fraud-on-the-market presumption can be applied in cases against defendants who did not themselves speak to the market. To the contrary, the Court has applied the presumption only to express speakers (*Basic*) while declining to extend it to reach sources of information who were not disclosed to the market (*Stoneridge*). Because this Court is no longer in the business of adjusting the contours of the Rule 10b-5 private right of action, it should simply confirm that the *Basic* presumption is limited to those who speak to the market, and that cases against secondary actors cannot proceed on a fraud-on-the-market theory. That alone would resolve this case.

2. Reliance Cannot Be Presumed In The Absence Of Direct Attribution

Even if the fraud-on-the-market presumption were not categorically inapplicable to cases against secondary actors, the reliance requirement ordinarily would not be satisfied in such cases precisely because the role (if any) of such actors in the alleged fraud is not known to the market and, therefore, incapable of being incorporated into the stock price. Only if the secondary actor's role were expressly (and contemporaneously) disclosed—such as where a statement is directly attributed to someone other than the issuer—could the fraud-on-the-market presumption apply.

a. The majority of the courts of appeals to address the issue have recognized that "a secondary actor cannot incur primary liability under [Rule 10b-5] for a statement not attributed to that actor at the time of its dissemination." *Wright*, 152 F.3d at 175. That is because, "[a]bsent attribution, plaintiffs can-

not show that they relied on defendants' *own* false statements, and participation in the creation of those statements amounts, at most, to aiding and abetting securities fraud." *PIMCO*, 603 F.3d at 148 (holding that a law firm cannot be held liable for drafting alleged misstatements in its client's offering documents); *see also, e.g.*, *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) (holding that an accounting firm cannot be held liable for drafting its client's allegedly fraudulent letters and press releases).

The attribution requirement "stems directly from the need for private litigants to prove reliance on an alleged fraud to succeed on a private cause of action." *SEC* v. *Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008) (emphases omitted). Imposing liability on a secondary actor for unattributed statements "would circumvent the reliance requirements" of Rule 10b-5 because "'[r]eliance only on representations made by others cannot itself form the basis of liability.'" *Wright*, 152 F.3d at 175 (quoting *Anixter*, 77 F.3d at 1225). That is, the plaintiff must demonstrate that it "rel[ied] on a secondary actor's *own* deceptive statements—and not on statements conveyed to the public through another source and not attributed to the defendant—to state a claim under Rule 10b-5(b)." *PIMCO*, 603 F.3d at 155-56.

Under the *Basic* presumption, the market absorbs the information in the prospectus and identifies it as coming from the registrant, which gives the information a particular value that is assumed to be incorporated into that company's stock price. *See PIMCO*, 603 F.3d at 156. If the prospectus contains misrepresentations, it is the company itself, and no one else, that can be held primarily liable, because

only the company's statement was considered by the market in valuing the stock's price. *See, e.g.*, *Ziemba*, 256 F.3d at 1207 ("no statements attributable to [the accounting firm] were ever made to Plaintiffs; therefore, Plaintiffs could not have relied on [the accounting firm] in making their investment decisions"). Attribution thus ensures that a necessary premise of the *Basic* presumption is satisfied—namely, that the market price for the relevant stock reflects *the defendant's* misstatement. 485 U.S. at 248 n.27.

The government's lawyers speculate that "[t]here is no reason to suppose that the investing public's willingness to rely on those statements would have depended on whether the public attributed those statements to JCM or solely to the Funds' own employees." U.S. Cert. Br. 16. But the market necessarily places a value on the *source* of information, and an issuer's statements about its own operations—the sort of misstatements at issue in *Basic*—have more value to analysts than a service provider's statements. The SEC's Regulation FD acknowledges as much. 17 C.F.R. § 243.100(a) ("Whenever an issuer ... discloses any material nonpublic information regarding that issuer or its securities to [(among others) a broker or dealer], the issuer shall make public disclosure of that information").

If an offering document expressly attributes a statement to a non-issuer, then the market can price it accordingly—*i.e.*, by applying an appropriate discount or premium. *See PIMCO*, 603 F.3d at 156 ("Where statements are publicly attributed to a well-known national law or accounting firm, buyers and sellers of securities (and the market generally) are more likely to credit the accuracy of those state-

ments"); *see generally* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 563-64 (1984). But without such contemporaneous attribution, market professionals could do no more than guess about what role any number of secondary actors—accountants, lawyers, investment banks, investment advisers, and so forth—might have played in preparing the final product.

Efficiency is not omniscience. "The market" is not a living and breathing entity; it operates through professionals, such as analysts, who consider publicly available statements about companies, and whose analyses and reports affect stock prices. *Basic*, 485 U.S. at 247 n.24 ("market professionals generally consider most publicly announced material statements about companies, thereby affecting stock prices"). Even if such professionals could surmise that a secondary actor may have played a role in helping the issuer prepare its offering materials, they have no way to determine (let alone value) the precise contribution of that secondary actor—and thus "reliance on that [actor]'s participation can only be shown through 'an indirect chain ... too remote for liability.'" *PIMCO*, 603 F.3d at 156 (quoting *Stoneridge*, 552 U.S. at 159).

When a public company includes unaudited financial statements in its quarterly SEC filings, for instance, there is every reason for "interested investors [to] attribute" to the company's auditor a "substantial role in ... approving" those statements. Pet. App. 24a. Indeed, federal law expressly provides that "interim financial statements included in quarterly reports on Form 10-Q ... must be reviewed by an independent public accountant using professional

standards and procedures for conducting such reviews." 17 C.F.R. § 210.10-01(d). Yet the auditor nonetheless cannot be held liable because "[t]he mere identification of a secondary actor as being involved in a transaction, or the public's understanding that a secondary actor 'is at work behind the scenes' are alone insufficient." *PIMCO*, 603 F.3d at 155 (quoting *Lattanzio*, 476 F.3d at 155).

b. The Fourth Circuit agreed that, "[t]o satisfy the fraud-on-the-market theory, the defendant must make a 'public misrepresentation,'" which means "the defendant must make a representation that is public and is attributable to the defendant." Pet. App. 18a (quoting *Basic*, 485 U.S. at 248 n.27). The attribution requirement is "necessary," the court noted, "to ensure that the misleading information 'is reflected in the market price of the security.'" *Ibid.* (quoting *Stoneridge*, 552 U.S. at 159).

The Fourth Circuit acknowledged that the Janus Funds' prospectuses were not attributed to JCM (Pet. App. 17a), as lead plaintiff conceded in the district court (*id.* at 46a). The court of appeals nonetheless held that "a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly *infer* that interested investors would have known that the defendant was responsible for the statement at the time it was made, even if the statement on its face is not directly attributable to the defendant." *Id.* at 23a-24a (emphasis added). This test was satisfied, the Fourth Circuit concluded, because "interested investors would *infer* that JCM played a role in preparing or approving the content of the Janus fund prospectuses" based on "the organizational structure of mutual funds." *Id.* at 29a, 31a (emphasis added).

The Fourth Circuit's inferential reasoning is premised on an unpleaded—and incorrect—impression of the organizational structure of the mutual fund industry. The investment adviser and its mutual fund client are separate legal entities, with separate ownership and separate governance structures. *Jones*, 130 S. Ct. at 1422. JCM and the Janus Funds are related only by a contract (*see* 15 U.S.C. § 80a-15), under which JCM is not "responsible" for "preparing or approving" the Janus Funds' prospectuses. Instead, the advisory agreement makes clear that compliance with the securities laws is the responsibility of the Janus Funds. Add., *infra*, 3a, 5a; *see also* Part I.B.1.b., *supra*. The Fourth Circuit acknowledged that JCM's "duties are detailed in [the offering] documents" (Pet. App. 28a); since prospectus disclosure is indisputably *not* among those duties, there is no basis to "infer" otherwise.

Moreover, by permitting plaintiffs to "infer" attribution (and thus reliance), the Fourth Circuit's decision stretches the *Basic* presumption past its breaking point. In *Basic*, this Court explained that presumptions "typically serve to assist courts in managing circumstances in which direct proof ... is rendered difficult." 485 U.S. at 245. The Court concluded that reliance on a defendant's public misrepresentations could be presumed because "[r]equiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if ... the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." *Ibid.* On top of that presumption, the Fourth Circuit has layered an additional *inference* to ease a plaintiff's burden in showing that the defendant made misrepresentations to the public.

Inferences, like presumptions, are used for elements that are typically incapable of direct proof, because they allow conclusions to be drawn from circumstantial evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390 n.30 (1983) (acknowledging that "proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence"). But an inference on top of a presumption constructs an evidentiary tower with no factual allegations to hold it up. Its structure is formed by facts presumed and inferred, *but not pleaded.*

Congress has authorized the use of inferences to plead only one element of a private Rule 10b-5 case: scienter. In the PSLRA, Congress provided that, to plead scienter, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2); *see also Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323-24 (2007). Mental state is rarely susceptible to direct proof, which explains Congress's decision to allow a plaintiff to rely on inferences. *See Huddleston*, 459 U.S. at 390 n.30; *see also* Fed. R. Civ. P. 9(b) ("conditions of a person's mind may be alleged generally"). But the other elements of the Rule 10b-5 action, including the factual predicates of the fraud-on-the-market presumption (*see Basic*, 485 U.S. at 248 n.27), *can* be proved directly, and thus must be pleaded "with particularity"—not inferred. Fed. R. Civ. P. 9(b); *see also* 15 U.S.C. § 78u-4(b)(1).

Permitting a new, judge-made inference to substitute for competent allegations of attribution (and hence reliance) would thus contravene Congress's judgment, in enacting the PSLRA, that the implied private right of action under Rule 10b-5 should not

"be extended beyond its present boundaries." *Stoneridge*, 552 U.S. at 165. This reasoning leaves no room for courts to invent new presumptions (or inferences) of reliance. *See Malack* v. *BDO Seidman, LLP*, No. 09-4475, 2010 WL 3211088, at *10 (3d Cir. Aug. 16, 2010) (invoking *Stoneridge* to "rejec[t] ... new presumptions of reliance").

The prospectuses containing the alleged misstatements were issued by a separate company, whose securities lead plaintiff did not purchase or sell, and the statements are not attributed to JCM. In these circumstances, JCM—a contractual service provider to the issuer—cannot be held to answer in a private securities-fraud suit for the statements of which lead plaintiff complains.

* * *

This Court has repeatedly acknowledged the danger of recognizing an entirely new class of Rule 10b-5 defendants by judicial fiat. *Central Bank*, 511 U.S. at 180; *Stoneridge*, 552 U.S. at 163-64; *see also Tambone*, 597 F.3d at 452-53 (Boudin, J., concurring); *Malack*, 2010 WL 3211088, at *10-*11. Affirming the decision below would subject contractual service providers to unprecedented private liability, and "the increased costs incurred by professionals because of the litigation and settlement costs under [Rule] 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors." *Central Bank*, 511 U.S. at 189; *see also, e.g.*, Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) ("Overbreadth and uncertainty deter beneficial conduct and breed costly litigation").

The Fourth Circuit's expansive view of the private right under Rule 10b-5 is at odds with the "narrow dimensions [courts] must give to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law." *Stoneridge*, 552 U.S. at 167; *see also Tellabs*, 551 U.S. at 327. Because the court below transgressed the bounds imposed by Congress and enforced by this Court in every post-PSLRA Rule 10b-5 decision, its decision cannot stand. The complaint was properly dismissed with prejudice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 3, 2010.

ADDENDUM

JANUS INVESTMENT FUND
INVESTMENT ADVISORY AGREEMENT
JANUS BALANCED FUND

THIS INVESTMENT ADVISORY AGREEMENT (the "Agreement") is made this 3rd day of April, 2002, between JANUS INVESTMENT FUND, a Massachusetts business trust (the "Trust"), and JANUS CAPITAL MANAGEMENT LLC, a Delaware limited liability company ("JCM").

W I T N E S S E T H:

WHEREAS, the Trust is registered as an open-end management investment company under the Investment Company Act of 1940, as amended (the "1940 Act"), and has registered its shares for public offering under the Securities Act of 1933, as amended (the "1933 Act"); and

WHEREAS, the Trust is authorized to create separate funds, each with its own separate investment portfolio of which the beneficial interests are represented by a separate series of shares; one of such funds created by the Trust being designated as the Janus Balanced Fund (the "Fund"); and

WHEREAS, the Trust and JCM deem it mutually advantageous that JCM should assist the Trustees and officers of the Trust in the management of the securities portfolio of the Fund.

NOW, THEREFORE, the parties agree as follows:

1. Investment Advisory Services. JCM shall furnish continuous advice and recommendations to the Fund as to the acquisition, holding, or disposition of any or all of the securities or other assets which the

Fund may own or contemplate acquiring from time to time. JCM shall give due consideration to the investment policies and restrictions and the other statements concerning the Fund in the Trust Instrument, bylaws, and registration statements under the 1940 Act and the 1933 Act, and to the provisions of the Internal Revenue Code, as amended from time to time, applicable to the Fund as a regulated investment company. In addition, JCM shall cause its officers to attend meetings and furnish oral or written reports, as the Trust may reasonably require, in order to keep the Trustees and appropriate officers of the Trust fully informed as to the condition of the investment portfolio of the Fund, the investment recommendations of JCM, and the investment considerations which have given rise to those recommendations. JCM shall supervise the purchase and sale of securities as directed by the appropriate officers of the Trust.

2. Other Services. JCM is hereby authorized (to the extent the Trust has not otherwise contracted) but not obligated (to the extent it so notifies the Trustees at least 60 days in advance), to perform (or arrange for the performance by affiliates of) the management and administrative services necessary for the operation of the Fund. JCM is specifically authorized, on behalf of the Trust, to conduct relations with custodians, depositories, transfer and pricing agents, accountants, attorneys, underwriters, brokers and dealers, corporate fiduciaries, insurance company separate accounts, insurers, banks and such other persons in any such other capacity deemed by JCM to be necessary or desirable. JCM shall generally monitor and report to the Fund's officers the Fund's compliance with investment policies and restrictions as set forth in the currently effective

prospectus and statement of additional information relating to the shares of the Fund under the Securities Act of 1933, as amended. JCM shall make reports to the Trustees of its performance of services hereunder upon request therefor and furnish advice and recommendations with respect to such other aspects of the business and affairs of the Fund as it shall determine to be desirable. JCM is also authorized, subject to review by the Trustees, to furnish such other services as JCM shall from time to time determine to be necessary or useful to perform the services contemplated by this Agreement.

3. Obligations of Trust. The Trust shall have the following obligations under this Agreement:

(a) to keep JCM continuously and fully informed as to the composition of its investment portfolio and the nature of all of its assets and liabilities from time to time;

(b) to furnish JCM with a certified copy of any financial statement or report prepared for it by certified or independent public accountants and with copies of any financial statements or reports made to its shareholders or to any governmental body or securities exchange;

(c) to furnish JCM with any further materials or information which JCM may reasonably request to enable it to perform its function under this Agreement; and

(d) to compensate JCM for its services and reimburse JCM for its expenses incurred hereunder in accordance with the provisions hereof.

4. Compensation. The Trust shall pay to JCM for its investment advisory services a fee, calculated and payable for each day that this Agreement is in effect, of 1/365 of 0.65% of the daily closing net asset value of the Fund (1/366 of 0.65% of the daily closing net asset value of the Fund in a leap year). The fee shall be paid monthly.

5. Expenses Borne by JCM. In addition to the expenses which JCM may incur in the performance of its investment advisory functions under this Agreement, and the expenses which it may expressly undertake to incur and pay under other agreements with the Trust or otherwise, JCM shall incur and pay the following expenses relating to the Fund's operations without reimbursement from the Fund:

(a) Reasonable compensation, fees and related expenses of the Trust's officers and its Trustees, except for such Trustees who are not interested persons of JCM; and

(b) Rental of offices of the Trust.

6. Expenses Borne by the Trust. The Trust assumes and shall pay all expenses incidental to its organization, operations and business not specifically assumed or agreed to be paid by JCM pursuant to Sections 2 and 5 hereof, including, but not limited to, investment adviser fees; any compensation, fees, or reimbursements which the Trust pays to its Trustees who are not interested persons of JCM; compensation of the Fund's custodian, transfer agent, registrar and dividend disbursing agent; legal, accounting, audit and printing expenses; administrative, clerical, recordkeeping and bookkeeping expenses; brokerage commissions and all other expenses in connection with execution of portfolio transactions (including any appropriate commissions paid to JCM or its af-

filiates for effecting exchange listed, over-the-counter or other securities transactions); interest; all federal, state and local taxes (including stamp, excise, income and franchise taxes); costs of stock certificates and expenses of delivering such certificates to purchasers thereof; expenses of local representation in Massachusetts; expenses of shareholders' meetings and of preparing, printing and distributing proxy statements, notices, and reports to shareholders; expenses of preparing and filing reports and tax returns with federal and state regulatory authorities; all expenses incurred in complying with all federal and state laws and the laws of any foreign country applicable to the issue, offer, or sale of shares of the Fund, including, but not limited to, all costs involved in the registration or qualification of shares of the Fund for sale in any jurisdiction, the costs of portfolio pricing services and compliance systems, and all costs involved in preparing, printing and mailing prospectuses and statements of additional information to fund shareholders; and all fees, dues and other expenses incurred by the Trust in connection with the membership of the Trust in any trade association or other investment company organization.

7. Treatment of Investment Advice. The Trust shall treat the investment advice and recommendations of JCM as being advisory only, and shall retain full control over its own investment policies. However, the Trustees may delegate to the appropriate officers of the Trust, or to a committee of the Trustees, the power to authorize purchases, sales or other actions affecting the portfolio of the Fund in the interim between meetings of the Trustees.

8. Termination. This Agreement may be terminated at any time, without penalty, by the Trustees

of the Trust, or by the shareholders of the Fund acting by vote of at least a majority of its outstanding voting securities, provided in either case that sixty (60) days advance written notice of termination be given to JCM at its principal place of business. This Agreement may be terminated by JCM at any time, without penalty, by giving sixty (60) days advance written notice of termination to the Trust, addressed to its principal place of business. The Trust agrees that, consistent with the terms of the Trust Instrument, the Trust shall cease to use the name "Janus" in connection with the Fund as soon as reasonably practicable following any termination of this Agreement if JCM does not continue to provide investment advice to the Fund after such termination.

9. Assignment. This Agreement shall terminate automatically in the event of any assignment of this Agreement.

10. Term. This Agreement shall continue in effect until July 1, 2002, unless sooner terminated in accordance with its terms, and shall continue in effect from year to year thereafter only so long as such continuance is specifically approved at least annually by the vote of a majority of the Trustees of the Trust who are not parties hereto or interested persons of any such party, cast in person at a meeting called for the purpose of voting on the approval of such terms of such renewal, and by either the Trustees of the Trust or the affirmative vote of a majority of the outstanding voting securities of the Fund. The annual approvals provided for herein shall be effective to continue this Agreement from year to year if given within a period beginning not more than ninety (90) days prior to July 1 of each applicable year, notwithstanding the fact that more than three hundred

sixty-five (365) days may have elapsed since the date on which such approval was last given.

11. Amendments. This Agreement may be amended by the parties only if such amendment is specifically approved (i) by a majority of the Trustees, including a majority of the Trustees who are not interested persons (as that phrase is defined in Section 2(a)(19) of the 1940 Act) of JCM and, if required by applicable law, (ii) by the affirmative vote of a majority of the outstanding voting securities of the Fund (as that phrase is defined in Section 2(a)(42) of the 1940 Act).

12. Other Series. The Trustees shall determine the basis for making an appropriate allocation of the Trust's expenses (other than those directly attributable to the Fund) between the Fund and the other series of the Trust.

13. Limitation of Personal Liability. All the parties hereto acknowledge and agree that all liabilities of the Trust arising, directly or indirectly, under this Agreement, of any and every nature whatsoever, shall be satisfied solely out of the assets of the Fund and that no Trustee, officer or holder of shares of beneficial interest of the Trust shall be personally liable for any of the foregoing liabilities. The Trust Instrument describes in detail the respective responsibilities and limitations on liability of the Trustees, officers and holders of shares of beneficial interest of the Trust.

14. Limitation of Liability of JCM. JCM shall not be liable for any error of judgment or mistake of law or for any loss arising out of any investment or for any act or omission taken with respect to the Trust, except for willful misfeasance, bad faith or gross negligence in the performance of its duties, or

by reason of reckless disregard of its obligations and duties hereunder and except to the extent otherwise provided by law. As used in this Section 14, "JCM" shall include any affiliate of JCM performing services for the Trust contemplated hereunder and directors, officers and employees of JCM and such affiliates.

15. Activities of JCM. The services of JCM to the Trust hereunder are not to be deemed to be exclusive, and JCM and its affiliates are free to render services to other parties. It is understood that trustees, officers and shareholders of the Trust are or may become interested in JCM as directors, officers and shareholders of JCM, that directors, officers, employees and shareholders of JCM are or may become similarly interested in the Trust, and that JCM may become interested in the Trust as a shareholder or otherwise.

16. Certain Definitions. The terms "vote of a majority of the outstanding voting securities," "assignment" and "interested persons" when used herein, shall have the respective meanings specified in the 1940 Act, as now in effect or hereafter amended, and the rules and regulations thereunder, subject to such orders, exemptions and interpretations as may be issued by the Securities and Exchange Commission under said Act and as may be then in effect.

IN WITNESS WHEREOF, the parties have caused their duly authorized officers to execute this Investment Advisory Agreement as of the date and year first above written.

JANUS CAPITAL MANAGEMENT LLC

By: /s/ _____

Thomas A. Early, Vice President

JANUS INVESTMENT FUND

By: /s/ _____

Kelley Abbott Howes, Vice President

RESPONDENT'S BRIEF

FILED
OCT 25 2010

No. 09-525

IN THE
Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,
Petitioners,

v.

FIRST DERIVATIVE TRADERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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October 26, 2010

963/10

QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly concluded that a mutual-fund investment adviser "ma[d]e" misrepresentations within the meaning of Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, when it wrote those misrepresentations, caused prospectuses for mutual funds that it created and managed to be issued containing those misrepresentations, and disseminated those prospectuses.

2. Whether a mutual-fund investment adviser that made misrepresentations in the prospectuses of mutual funds that it created and managed can avoid liability under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 on the ground that the prospectuses containing those misrepresentations were directly and contemporaneously attributed to the funds, rather than the adviser.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent First Derivative Traders states the following:

First Derivative Traders is not a publicly held corporation, has no parent corporation, and has no stock held by any publicly held corporation.

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INTRODUCTION

Petitioner Janus Capital Group Inc. ("JCG") created and manages the Janus family of mutual funds ("Janus Funds" or "Funds") through its wholly owned operating subsidiary, petitioner Janus Capital Management LLC ("JCM"). The Janus Funds are pools of assets; they have no employees of their own; and JCM manages their operations. For years, unbeknownst to JCG's shareholders and investors in the Funds, JCM permitted a select number of hedge funds to engage in "market timing" in the Funds. "Market timing" refers to trading through which arbitrageurs exploit inefficiencies in the pricing of a mutual fund's shares to the detriment of other fund investors. Petitioners recognized that mutual funds that allow market timing are not attractive investments for ordinary investors, so, in the Funds' prospectuses, JCM represented that its policies and practices prevented market timing. Those representations were false.

In September 2003, an investigation by the New York Attorney General publicly revealed JCM's secret market-timing arrangements. Following that revelation, JCG's common stock price plummeted, and investors in the Janus Funds redeemed their shares at a dramatic rate. JCG's revenues derived primarily from passed-through profits from JCM, whose fees for managing the Funds were calculated based on a percentage of assets under management in the Funds. When the Funds' assets decreased and confidence in JCM declined, JCG's financial performance suffered. In this action, JCG's shareholders seek compensation from JCG and JCM for their investment losses caused by JCM's material misstatements regarding its market-timing policy.

Petitioners contend that they are not liable for securities fraud on the theory that the Janus Funds – not JCM – "made" the misrepresentations regarding market timing in the prospectuses. The Fourth Circuit correctly held, however, that JCM, which operates the Funds and which created and disseminated the misrepresentations in the prospectuses, made the misstatements regarding its own market-timing policy.

Petitioners also argue that, even if JCM made the misstatements, it should not be responsible for them because the prospectuses were issued in the Janus Funds' names, rather than JCM's. To evade liability, petitioners request that this Court impose a "direct attribution" requirement for JCM's misrepresentations. This Court, however, has never recognized such a requirement, and to do so would contravene congressional policy that promotes honesty and transparency in the Nation's securities markets. In any event, the Fourth Circuit correctly concluded that, given the publicly disclosed facts confirming JCM's day-to-day control of the Funds, a reasonable investor would attribute the misstatements in the prospectuses to JCM.

If adopted by this Court, petitioners' theory would provide a roadmap for unscrupulous companies to commit securities fraud. Such a firm could form a shell corporation and create and disseminate misrepresentations about its activities in the shell corporation's name. On petitioners' view, such a scheme could enable the wrongdoer to avoid liability in both private suits and government enforcement proceedings, because the government also must establish that a defendant "made" a misrepresentation.

STATEMENT

1. JCG is a publicly traded holding company that, through its subsidiaries, sponsors and markets mutual funds and provides investment advisory and administrative services to those funds. App.[1] 5a, 59a (¶ 2).[2] JCM is the wholly owned subsidiary and primary operating company of JCG. App. 5a, 59a (¶ 2). JCM acts as the investment adviser and manager of the various Janus mutual funds at issue here. App. 5a, 59a (¶ 2).

A mutual fund, such as the Janus Funds, is a pool of assets that typically is created, operated, and controlled by an entity known as an investment adviser, such as JCM. *See Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010); *see also Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 731 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc) ("mutual funds are 'captives' of investment advisers") (internal quotations omitted). Securities and Exchange Commission ("SEC" or "Commission") filings by the various Janus entities during the time period involved in this action (July 2000 to September 2003), including the Funds' prospectuses, informed the investing public that JCM controlled

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[1] "App." refers to the appendix accompanying the certiorari petition, and "JA" refers to the Joint Appendix accompanying petitioners' opening merits brief.

[2] At this stage of the litigation, the Court accepts as true the factual allegations in the Second Amended Complaint, *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), which is considered "in its entirety," along with "documents incorporated into the complaint by reference" and "matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

the Funds.[3] Under the heading "Management of the Funds," the prospectuses explained that JCM "is responsible for the day-to-day management of the investment portfolios of" the Funds; that it "furnishes certain administrative, compliance and accounting services for the Funds"; and that it "provides office space for the Funds." JA359a-360a.

Every one of the Janus Funds' 17 officers was a Vice President at JCM. JA250a-258a; *see also* JA360a ("[JCM] employees serve as officers of the [Funds] and [JCM] . . . pays the salaries, fees and expenses of all Fund officers and those [Funds] Trustees who are interested persons of [JCM]"). The Funds' General Counsel, Thomas Early, also was General Counsel and Vice President of JCM and General Counsel, Corporate Affairs Officer, Vice President, and Secretary of JCG. JA254a. The Janus Funds' Board of Trustees was chaired by the founder and former CEO of JCG, Thomas Bailey. JA249a. The same filings also disclosed that the Janus entities engaged in a coordinated marketing strategy that blurred the distinction between the entities that constituted JCG's business, so that investors perceived a unified Janus brand. *See* JCG Form 10-K at 3-4 (Mar. 28, 2003).

More than 90% of JCG's revenue came from fees generated by JCM's management of mutual funds, with JCM's fee calculated as a percentage of assets in the Janus Funds. App. 60a (¶ 4), 64a (¶ 17), 107a (¶ 115). When investors in the Janus Funds redeemed

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[3] A prospectus is a communication offering to sell a security. *See* 15 U.S.C. §§ 77b(a)(10), 80a-2(a)(31). The SEC has promulgated regulations describing the information that must be contained in mutual-fund prospectuses. *See* 17 C.F.R. §§ 270.8b-1, 270.8b-10, 274.11A.

their shares, the amount of assets under management in the Funds decreased, resulting in a corresponding reduction in JCM's – and, in turn, JCG's – revenue. App. 69a (¶ 30). In pertinent SEC filings, JCG identified as the number one risk to its business that "[a]ny decrease in the value of Janus' assets under management would adversely affect revenues and profits." JCG Form 10-K at 7 (Mar. 28, 2003) (incorporated by reference in the complaint at App. 94a (¶ 80)). It explained that, because "the majority of [JCG's] revenues are related directly to the value of the assets under management, any decline in the value or amount of those assets would have an adverse effect on revenues." *Id.*

2.a. The underlying misconduct alleged in this case involves a practice known as "market timing," which refers to trading in mutual-fund shares to exploit stale prices for stocks listed on foreign exchanges. Most mutual funds calculate the net asset (i.e., market) value, or "NAV," of their entire portfolio only once per day, typically at the 4:00 p.m. Eastern Time close of trading on New York exchanges. Some fund assets are listed on foreign exchanges, which may have closed as many as 15 hours before the close of the New York market. Market timers purchase mutual-fund shares on days when the foreign securities in a fund's portfolio are undervalued and redeem shares on days when the foreign securities are overvalued. App. 5a-6a, 68a (¶ 26); *see also Kircher v. Putnam Funds Trust*, 547 U.S. 633, 637 n.4 (2006).

Market timers' profits are supplied dollar-for-dollar by long-term holders of mutual-fund shares, which are continually devalued by ongoing market timing. *See generally* App. 68a-69a (¶¶ 27-28). Market-timing trades also increase costs for the fund's long-term investors, as the prospectuses here explained.

App. 69a (¶ 28); JA357a ("Frequent trades into or out of a Fund can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders, including long-term shareholders who do not generate these costs.").

Because market timing is harmful to long-term holders of mutual-fund shares, most ordinary investors view mutual funds that permit market timing as unattractive investments. App. 69a (¶ 29).

b. To induce investors to purchase shares in the Janus Funds, JCM "wrote and represented [a] policy against market timers." App. 69a (¶ 31). It "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCM] would implement measures to curb market timing in the Janus Funds." App. 60a (¶ 6). Those prospectuses stated that the Funds were "not intended for market timing or excessive trading." JA357a; *see also* App. 99a (¶ 88) (describing internal JCM e-mail acknowledging that "[o]ur stated policy is that we do not tolerate timers"). The prospectuses detailed measures employed to deter suspected market timing in the Funds, including closing accounts and imposing redemption fees for Fund shares held less than three months. App. 72a-80a (¶¶ 40-52). JCM disseminated the prospectuses to the investing public through JCG's website. App. 72a (¶ 38), 107a (¶ 114); *see also* App. 71a (¶ 36).

Despite announcing a policy prohibiting market timing in the Janus Funds, JCM secretly allowed such transactions. App. 80a (¶ 52), 96a (¶ 85). Petitioners' motive in pursuing those market-timing arrangements was to collect more in management and advisory fees by allowing market timing in the

Funds in return for the timer's agreement to place a certain amount of "sticky" or "static" assets – long-term investments – in other investment vehicles managed by JCM. App. 97a-100a (¶¶ 87-88), 102a-104a (¶¶ 95-104).

JCG's CEO, Mark Whiston, knew about the market timing done under these arrangements. App. 108a (¶¶ 118-119). JCM's operations group closely tracked the market timing, and JCM's senior management received reports about those arrangements. App. 97a-100a (¶¶ 87-88), 108a-109a (¶¶ 116-120).

c. On September 3, 2003, the New York Attorney General filed a complaint against a hedge fund engaged in market timing the Janus Funds. App. 96a (¶ 86). The complaint revealed JCM's secret market-timing arrangements. App. 96a-100a (¶¶ 86-88). Multiple senior executives resigned in the wake of the scandal. App. 62a (¶ 9), 103a-104a (¶¶ 97, 103), 108a (¶ 117).

Following the revelations of the secret market-timing arrangements, investors withdrew at least $14 billion from the Janus Funds. App. 62a (¶ 10), 105a (¶ 107). The post-scandal withdrawal rate was triple the pre-scandal rate. App. 62a (¶ 10). The expectation of such a decrease in JCM's assets under management precipitated a decline in JCG's stock price. JCG's stock price fell nearly 13% in the day following the September 3 announcement of the Attorney General's complaint, and by nearly 24% by September 26. App. 106a (¶ 112).

3. In 2003 and 2004, purchasers of JCG's common stock filed actions alleging violations of § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. App. 4a. The actions were coor-

dinated in the District of Maryland with numerous other actions arising from the market-timing scandal, and the district court appointed respondent lead plaintiff. *Id.*; *see* 15 U.S.C. § 78u-4(a)(3). In September 2004, respondent filed an amended complaint, respondent's first pleading in the coordinated action. App. 4a. That complaint alleged violations of § 10(b) and Rule 10b-5 by petitioners, and it alleged that JCG also is liable under § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), as a "controlling person" of JCM. JA61a-118a.

In February 2005, petitioners moved to dismiss respondent's complaint. App. 4a. In February 2006, the district court granted that motion on the narrow ground that the proposed class definition included investors who could not satisfy the standard for loss causation prescribed in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). JA159a-161a. The court subsequently granted respondent three days in which to file a second amended complaint ("the complaint") for the sole purpose of curing the defect in the class definition. JA162a-163a.

In May 2007, following the filing of another motion to dismiss by petitioners, the district court entered an order dismissing the complaint. App. 42a-55a. It held that JCG did not make the misstatements in the prospectuses and therefore did not violate § 10(b). App. 44a-49a. The court concluded that JCM had "no duty" to JCG shareholders. App. 50a. It did not reach the question "whether JCM made the alleged misstatements upon which plaintiffs rely." App. 50a n.5.

4. The Fourth Circuit reversed the district court's judgment and remanded the case for further proceedings. App. 1a-41a.

Petitioners defended the district court's judgment on the ground that the complaint did not plead reliance. App. 13a-14a. They argued that the presumption of reliance this Court recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and reaffirmed in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), did not apply here because petitioners did not "make" the misstatements in question and because those misstatements were not expressly and contemporaneously attributed to petitioners. App. 16a-17a. The Fourth Circuit rejected both contentions, holding that the complaint alleged that JCM and JCG had made the misstatements in the Funds' prospectuses regarding market timing and that those statements were attributable to JCM.

On the first issue, the Fourth Circuit explained that "the complaint alleges that [petitioners] 'wrote and represented [their] policy against market timers,' and 'publicly issued false and misleading statements'" regarding that policy. App. 17a (quoting complaint; citation omitted; second alteration in original). "According to the complaint, [petitioners] *made* th[o]se representations by 'caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public,' through filings with the SEC and dissemination on a joint Janus website." App. 17a-18a (quoting complaint; citation omitted; third and fourth alterations in original). The court concluded that the complaint's allegations, "taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." App. 18a.

On the attribution issue, the Fourth Circuit stated that "a plaintiff can plead fraud-on-the-market

reliance by alleging facts from which a court could plausibly infer that interested investors would have known that the defendant was responsible for the statement at the time it was made." App. 23a-24a. In applying that standard, the court emphasized the complaint's allegations that "JCM in its role as investment advisor to the Janus Funds 'is responsible for the day-to-day management of [the] . . . business affairs of the funds' and 'furnishes . . . administrative, compliance and accounting services for the funds'" and that the prospectuses and statements of additional information for the Funds identify JCM as the investment adviser and describe its duties. App. 27a-28a (brackets in original). It also noted the allegations that "JCG and JCM and the Janus Funds held themselves out to the investing public as a single entity: 'Janus'" and that JCM disseminated the prospectuses and marketed shares in the Funds to the investing public. App. 30a (quoting complaint). Considering the complaint in its entirety, the court held that, "given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses, particularly the content pertaining to the funds' policies affecting the purchase or sale of shares." App. 31a.

Although the Fourth Circuit concluded that the complaint's allegations of attribution "are insufficient to reach JCG," App. 32a, it held that the complaint adequately pleaded a claim of controlling-person liability against JCG under § 20(a). App. 36a-40a.[4]

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[4] Petitioners do not challenge that holding in this Court. Pet. Br. 7 n.2.

SUMMARY OF ARGUMENT

I. SEC Rule 10b-5 construes it a violation of Exchange Act § 10(b) "[t]o make any untrue statement of a material fact." 17 C.F.R. § 240.10b-5(b). Under Rule 10b-5's plain language, an entity that creates or causes to exist a statement about its own conduct "make[s]" that statement. That interpretation follows from the ordinary meaning of the word "make," and comports with the SEC's construction of that term in Rule 10b-5. That well-settled meaning of "make," which the Commission has articulated and applied in multiple and varied proceedings for more than a decade, is entitled to deference. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997). Petitioners cannot show that the SEC's reasonable construction of its rule is plainly erroneous or inconsistent with the regulation.

Respondent pleaded that JCM made misstatements regarding its market-timing policy in the Janus Funds' prospectuses. The complaint alleges that JCM "wrote and represented [a] policy against market timers"; that it "represented that [the Funds] were designed to be long-term investments for 'buy and hold' investors"; that it "publicly issu[ed] false and misleading statements" regarding its market-timing policy; and that it "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCM] would implement measures to curb market timing in the Janus Funds." App. 60a (¶¶ 5-6), 69a (¶ 31), 109a (¶ 122). Related materials appropriate for consideration in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) confirm JCM's responsibility for the misstatements in the prospec-

tuses. Petitioners' criticisms of the complaint and their caricature of the Fourth Circuit's decision cannot defeat the complaint's well-pleaded allegations at this stage of the litigation.

Petitioners also contend that investment advisers such as JCM are secondary actors with respect to their captive mutual funds. Regardless of the accuracy of that proposition, it is irrelevant in this case. Respondent filed this action against the issuer of the securities in which it transacted (JCG) and the issuer's wholly owned operating subsidiary (JCM) to recover for investment losses caused by material misrepresentations made by JCM to the investing public. Respondent is not a shareholder in a mutual fund seeking to hold an investment adviser liable for providing services to the fund. Moreover, respondent pursues no theory of secondary or aiding-and-abetting liability against JCM.

In any event, petitioners' attempt to paint JCM as a mere "service provider" is inconsistent with the complaint, which alleges that JCM "is responsible for the . . . day-to-day management" of and "as a practical matter . . . runs" the Funds. App. 59a (¶ 2), 71a (¶ 34). Those allegations are consistent with the federal regime regulating mutual-fund investment advisers for the protection of mutual-fund shareholders. The SEC, which administers that regime, recognizes that "investment advisers typically dominate the funds they advise." *Role of Independent Directors of Investment Companies*, 66 Fed. Reg. 3734, 3735 n.3 (Jan. 16, 2001).

II. The complaint alleges reliance on JCM's misrepresentations regarding its market-timing policy. Under this Court's cases, "reliance is presumed" when material misstatements "become public," because

it can then "be assumed that an investor who buys or sells stock at the market price relies upon the statement." *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247). Petitioners do not contest the materiality of the misstatements to investors in JCG. Nor could they: the price of JCG's shares dropped precipitously following disclosure of the truth about JCM's market-timing practices that directly affected JCG's revenue.

Petitioners contend that reliance on a public misrepresentation cannot be presumed unless that misrepresentation was, on its face, attributed to the defendant. That rule conflicts with this Court's cases, which establish that whether the presumption of reliance applies in cases involving public misstatements about publicly traded companies turns on the materiality of the information, not the speaker's identity. Imposing a new direct-attribution requirement in § 10(b) actions would frustrate Congress's purposes of promoting honest securities markets and investor confidence. As applied in this case, it would allow JCM "to avoid Section 10(b) liability simply by declining to state explicitly what the investing public already knows." U.S. Cert. Br. 16.

In any event, the Fourth Circuit correctly concluded that a reasonable investor would have attributed the misrepresentations regarding market timing in the Janus Funds' prospectuses to JCM, given the publicly disclosed facts regarding JCM's role in creating and managing the Funds.

ARGUMENT

Section 10(b) of the Exchange Act makes it "unlawful" for "any person, directly or indirectly," to "use or employ . . . any manipulative or deceptive device or contrivance in contravention of" Commission rules. 15 U.S.C. § 78j(b). Rule 10b-5, which implements § 10(b), makes it "unlawful" for "any person, directly or indirectly" — "(a) [t]o employ any device, scheme, or artifice to defraud"; "(b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading"; or "(c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5.

As this Court has recognized, Congress's primary purposes in enacting the Exchange Act were to establish "honest securities markets and thereby promote investor confidence after the market crash of 1929" and "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotations omitted). The "statute should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.* (internal quotations omitted).

This Court has recognized a private right of action under § 10(b) and Rule 10b-5. *See Stoneridge*, 552 U.S. at 157. The elements of a private § 10(b) action are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepre-

sentation or omission; (5) economic loss; and (6) loss causation." *Id.*. The Court "has long recognized that meritorious private actions to enforce federal anti-fraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions." *Tellabs*, 551 U.S. at 313; *see also Dura*, 544 U.S. at 345 ("The securities statutes seek to maintain public confidence in the marketplace . . . by deterring fraud, in part, through the availability of private securities fraud actions.").

This case concerns the conduct element of § 10(b) and Rule 10b-5 and the reliance element of a private § 10(b) action.

I. JCM MADE MISSTATEMENTS

A. An Entity That Creates Or Causes To Exist A Statement Describing Its Own Conduct "Makes" A Statement Actionable Under Rule 10b-5

1. Under the plain language of Rule 10b-5, an entity that creates a statement about its own conduct "make[s]" that statement. Rule 10b-5 makes it "unlawful" "[t]o make any untrue statement of a material fact." 17 C.F.R. § 240.10b-5(b). The term "make" is not defined in the rule and therefore should be given its ordinary meaning. *See Smith v. United States*, 508 U.S. 223, 228 (1993). "[M]ake" means "[t]o cause to exist, appear, or occur," *Webster's New International Dictionary* 1485 (2d ed. 1934) ("*Webster's Second*") – that is, "to create" or "to compose," *Webster's Third New International Dictionary* 1363 (2002) ("*Webster's Third*"). *See Black's Law Dictionary* 1145 (3d ed. 1933) ("To cause to exist"); *Black's Law Dictionary* 1041 (9th ed. 2009) ("To cause (something) to exist"); *see also SEC v. Tambone*, 597 F.3d 436, 443 (1st Cir. 2010) (en banc) (defining "make" to

include "create or cause"); *id.* at 450-51 ("The word 'make,' in reference to a statement, ordinarily refers to one authoring the statement or repeating it as his own") (Boudin, J., concurring); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668 (2007) (referring to dictionary definition in determining the meaning of a regulation). Moreover, interpreting the term "make" in Rule 10b-5 to include causing a statement to exist or creating it is especially appropriate in cases where, as here, the misstatements in question concern the defendant's own conduct. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 n.32 (1976) (explaining that SEC adopted Rule 10b-5 in response to corporate officer's misstatements regarding the operations of his company).

2. Giving the term "make" in Rule 10b-5 its ordinary meaning comports with the interpretation of the SEC, whose construction of its own regulation is entitled to deference.

a. The SEC interprets the term "make" in Rule 10b-5(b) to include creating a statement or causing a statement to exist. *See* U.S. Cert. Br. 11 ("when a person, acting alone or with others, creates a misrepresentation or causes it to be made, that person can be liable as a primary violator"). The Commission has held that view for more than a decade,[5] and it has applied that interpretation in a formal adjudication. *See In re Armstrong*, Release No. 51920, 85 S.E.C. Docket 2321, 2005 WL 1498425, at *7 (June 24, 2005) ("A person can be primarily liable under Section 10(b) and Rule 10b-5 for directly or indirectly making an untrue statement of fact if that person,

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[5] *See* SEC Amicus Brief at 17-19, *Klein v. Boyd*, Nos. 97-1143 & 97-1261 (3d Cir. filed Apr. 30, 1998) ("SEC *Klein* Br."), *available at* http://www.sec.gov/pdf/klein.pdf.

acting alone or with others, creates a false statement that reaches investors.").[6]

b. The SEC's interpretation of the term "make" in its Rule 10b-5 is entitled to deference. *See Auer*, 519 U.S. at 461; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In *Auer*, this Court held that an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (internal quotations omitted). The Court has reaffirmed and applied that rule on multiple occasions in recent years. *See, e.g., Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2470 (2009) (agency's interpretation of its regulations "is not plainly erroneous or inconsistent with the regulation[s], and so we accept it as correct") (internal quotations omitted; alteration in original); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.") (citation

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[6] After *Armstrong*, the Commission consistently has confirmed its interpretation in legal briefs submitted in the federal courts of appeals. *See, e.g.*, Brief of Respondent at 30, *McConville v. SEC*, 465 F.3d 780 (7th Cir. 2006) (No. 05-3510), 2005 WL 3749754 ("The Commission concluded, after *Central Bank* [*of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)], that the creation of a misstatement by an individual that reaches investors is sufficient to find that the individual 'made' the misstatement, thereby establishing primary liability."); SEC Amicus Brief at 7, *Pacific Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010) ("SEC *PIMCO* Br.") ("In the Commission's view, a person makes a false or misleading statement and thus can be liable as a primary violator of Rule 10b-5 when that person *creates* the statement.").

omitted); *National Ass'n of Home Builders*, 551 U.S. at 672.

Deference is particularly appropriate here, for multiple reasons. Although the Court deferred to a regulatory interpretation contained in an *amicus* brief in *Auer*, here the SEC has articulated its interpretation not only in briefs but also in a formal adjudication in *Armstrong*. This Court has treated agency interpretations articulated in formal adjudications as on par with interpretations announced in rulemakings; both are accorded the highest degree of deference. *See, e.g., Zandford*, 535 U.S. at 819-20. Moreover, the case for deference here is especially strong. The SEC's interpretation reflects the agency's exercise of specifically delegated discretion to enforce a complex regulatory scheme. *See Heckler v. Chaney*, 470 U.S. 821, 835 (1985). And the agency has "rendered binding, consistent, official interpretations" of the regulation "over a long period of time." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 41 n.27 (1977).[7] Moreover, courts have approved of the SEC's interpretation of the term "make" in Rule 10b-5. *See McConville v. SEC*, 465 F.3d 780, 787-88 (7th Cir. 2006); *see also SEC v. Wolfson*, 539 F.3d 1249, 1260-61 (10th Cir. 2008) (following *McConville*).

B. JCM Created And Caused To Exist The Misstatements About Its Practices With Respect To Market Timing

1. Respondent alleges that JCM both wrote (i.e., created) its policy regarding market timing in the Janus Funds and caused the Funds' prospectuses to

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[7] This Court consistently has applied the normal principles of administrative deference to the SEC's interpretations of § 10(b) and Rule 10b-5. *See, e.g., Zandford*, 535 U.S. at 819-20.

be issued and disseminated containing that policy. That suffices to plead that JCM made the misrepresentations in the Funds' prospectuses regarding its market-timing policy.

Specifically, the complaint alleges that JCM "wrote and represented [a] policy against market timers," App. 69a (¶ 31), and that it "represented that [the Janus Funds] were designed to be long-term investments for 'buy and hold' investors," App. 60a (¶ 5). It further alleges that JCM "publicly issu[ed] false and misleading statements" regarding the market-timing policy, App. 109a (¶ 122); "made . . . a series of materially false or misleading statements about" that policy, App. 110a (¶ 123); "made untrue statements of material fact," App. 112a (¶ 128); *see id.* (¶ 130); and "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCM] would implement measures to curb market timing in the Janus Funds," *id.* (¶ 6). JCM also disseminated the Funds' prospectuses. App. 72a (¶ 38) (JCM "makes the most recent prospectus for each Janus Fund available on its website").

The complaint describes the relationship between JCM and the Janus Funds, which provides context for the allegation that JCM "caused" the issuance of the prospectuses. It alleges that JCM "is responsible for the day-to-day management of its investment portfolio and other business affairs of the funds." App. 65a (¶ 18); *see also* App. 59a (¶ 2). The complaint further explains that JCM "furnishes advice and recommendations concerning the funds' investments, as well as administrative, compliance and accounting services for the funds." App. 65a (¶ 18);

see also App. 71a (¶ 34) ("as a practical matter the [investment adviser] runs [the mutual fund]").

The prospectuses, which are incorporated by reference in the complaint (*e.g.*, App. 72a (¶ 38)), confirm that JCM was charged with control over the "day-to-day management" of the "business affairs" of the Janus Funds as well as their "administrative" and "compliance" services. JA359a-360a. Every one of the Funds' 17 officers was a JCM Vice President. JA250a-258a. And JCM "provides office space for the Funds," JA360a, which the district court found in a related case "have no assets separate and apart from those they hold for shareholders," *In re Mutual Funds Inv. Litig.*, 384 F. Supp. 2d 845, 853 n.3 (D. Md. 2005). Moreover, the address under the signature line in the prospectuses – 100 Fillmore Street, Denver, Colorado 80206-4928 – was the address for the headquarters of both JCM and JCG. JA359a, 403a, 431a. And the prospectuses are signed by "Janus," a name to which JCM reserved the right. JA275a.

Once the market-timing scandal became public, JCG accepted responsibility for the false statements in the prospectuses. JCG's CEO Mark Whiston announced in a JCG press release that "It's our hope that the measures we're announcing today will help resolve this situation in a way that recognizes the importance of the matter. Most of all, we hope this action demonstrates that Janus is committed to living up to the high ethical standards that our shareholders expect of us." App. 101a (¶ 92). That public statement confirms respondent's allegations: JCM – JCG's wholly owned operating subsidiary – made false statements regarding its own policy on market

timing, which brought substantial harm to JCG's shareholders.

2. The well-recognized and uniquely close relationship between a mutual fund and its investment adviser reinforces the plausibility of the complaint's allegations. As this Court has recognized, mutual funds are "typically created and managed by a pre-existing external organization known as an investment adviser." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (citing *Burks v. Lasker*, 441 U.S. 471, 481 (1979)); *see Jones*, 130 S. Ct. at 1422 (observing that it is "typical" for an investment adviser to "create[] the mutual fund"); S. Rep. No. 91-184, at 5 (1969). The adviser "selects the fund's directors," *Jones*, 130 S. Ct. at 1422, who "often" are "affiliated" with the adviser, *Daily Income Fund*, 464 U.S. at 536 (citing *Burks*, 441 U.S. at 481). "[T]he relationship between a mutual fund and its investment adviser" is so symbiotic that the fund often "'"cannot, as a practical matter sever its relationship with the advisor."'" *Jones*, 130 S. Ct. at 1422 (quoting *Burks*, 441 U.S. at 481 (quoting S. Rep. No. 91-184, at 5)).

The adviser "generally supervises the daily operation of the fund." *Daily Income Fund*, 464 U.S. at 536 (citing *Burks*, 441 U.S. at 481). Indeed, the mutual fund "may have no employees of its own." *Jones*, 130 S. Ct. at 1422. The investment adviser thus "manages the fund's investments, and provides other services." *Id.* The "other services" that investment advisers provide often include preparing prospectuses. *See* Investment Co. Inst. Amicus Brief at 18, *Jones v. Harris Assocs. L.P.*, *supra* ("Mutual fund advisers . . . prepare prospectuses, shareholder reports and other disclosures *for which they have liability under the securities laws*.") (emphasis added).

Given those well-known facts about the relationship between many mutual funds and the investment advisers that create them, the complaint's allegations that JCM made the misstatements regarding JCM's policy with respect to market timing in the prospectuses plainly are plausible.

3. As this case has proceeded, orders issued in other regulatory and judicial proceedings – matters "of which [this Court] may take judicial notice," *Tellabs*, 551 U.S. at 322 – have confirmed the allegations in the complaint and the documents referenced therein.

In a 2004 cease-and-desist order, the SEC found that "*JCM filed* several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds." *In re Janus Capital Mgmt., LLC*, Release No. 2277, 83 S.E.C. Docket 1766, ¶ 26 (Aug. 18, 2004) (emphasis added), *reproduced at* JA415a. The Commission further found that, "[b]etween November 2001 and September 2003, JCM provided [the Funds'] prospectuses to shareholders . . . and filed registration statements containing these prospectuses with the Commission." *Id.* ¶¶ 20-21 (JA413a). In addition, in a 2008 order, an SEC Administrative Law Judge found that JCM's legal department "had the responsibility for drafting" the Funds' prospectuses.[8]

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[8] Initial Decision at 15, 21, *In re Lammert*, Release No. 348, Admin. Proc. File No. 3-12386 (SEC Apr. 28, 2008), *available at* http://www.sec.gov/litigation/aljdec/2008/id348cff.pdf. That initial decision became final on May 29, 2008. *See* Final Decision, *In re Lammert*, Release No. 8921, Admin. Proc. File No. 3-12386

In 2005, in a related action arising out of the events at issue here, the district court dismissed private § 10(b) claims against the Janus Funds because the Funds themselves had no assets "separate and apart from those they hold for shareholders" that could have engaged in securities fraud. *In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3. In a 2008 order, the same court found "ample evidence of substantial involvement by employees of the Janus . . . investment advisers [JCM], including members of their legal department, in the drafting and review of fund prospectuses." *In re Mutual Funds Inv. Litig.*, 590 F. Supp. 2d 741, 747 (D. Md. 2008). Indeed, petitioners there "admit[ted] that 'it is undisputed that the Janus legal department drafted and edited certain prospectus language, which was then circulated among JCM and JCG employees for review.'" *Id.*

4. Although the complaint and related materials that the Court may consider under *Tellabs* make clear that respondent's complaint adequately alleged that JCM made the misstatements in question, petitioners' own discovery responses in the district court further confirm that fact.[9] In an interrogatory

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(SEC May 29, 2008), *available at* http://www.sec.gov/litigation/aljdec/2008/33-8921.pdf.

[9] Petitioners suggest (at 33-34) that the Court must ignore their own admissions in sworn discovery responses. Regardless of whether discovery material is generally appropriate for consideration in ruling on a motion to dismiss under Rule 12(b)(6), however, these discovery responses eliminate any uncertainty that, if given leave to amend the complaint, respondent could plead actionable misstatements by JCM. *Cf. Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 195 (4th Cir. 2009) (appellate court considers plaintiffs' proffered additional allegations in deciding whether district court abused its discretion in denying opportunity to amend complaint).

response, JCM admitted that its in-house attorneys, "Kelley Howes, Bonnie Howe, and other members of JCM's legal department," drafted the prospectuses. JA507a. In addition to the individuals in JCM's legal department who drafted the prospectuses, Thomas Early, a JCM in-house attorney (*see id.*) and General Counsel to the Janus Funds, was one of two individuals "ultimately responsible" for changes made to the prospectuses. JA508a.[10] At least 70 JCM-affiliated personnel may have reviewed and commented upon the prospectus language concerning JCM's "excessive trading policy." JA508a-518a. Those admissions, which are consistent with JCM's public statements about its relationship to the Funds (*see supra* Part I.B.1), reinforce the plausibility of the complaint's allegations.[11]

Although the district court stated at a hearing that it would not grant leave to amend, JA469a, that issue would be subject to an appropriate order from this Court.

[10] Mr. Early, the *Janus Funds'* General Counsel, signed the investment advisory agreement between JCM and the Funds *on behalf of JCM*, *see* Pet. Br. Add. 9a, thereby underscoring the Funds' lack of independence from JCM.

[11] Petitioners may assert that, in drafting the prospectuses, JCM's in-house lawyers acted as counsel to the Janus Funds. *See* JA507a; *see also* Pet. Br. 24, 31. But the assertion that the members of JCM's legal department performed the Funds' legal work would serve only to undermine further the Funds' alleged independence from their adviser. Moreover, the claim that the in-house lawyers represented the Funds in drafting the prospectuses would be dubious, particularly considering the supposedly independent relationship between JCM and the Funds. As petitioners note (at 24), the SEC considers "an attorney employed by an investment adviser who prepares, or assists in preparing, materials for a [mutual fund] that the attorney has reason to believe will be submitted to or filed with the Commission by or on behalf of [the fund] [to be] appearing and practic-

C. Petitioners' Contention That JCM Did Not "Make" The Prospectus Misstatements As A Matter Of Law Is Unpersuasive

Petitioners contend (at 31-43) that the complaint does not adequately allege that JCM "made" the misstatements regarding market timing in the prospectuses. Their theory of Rule 10b-5 is inconsistent with the SEC's own reasonable interpretation of the rule's language and mischaracterizes both the Fourth Circuit's decision and the complaint.

1. Holding JCM liable is consistent with § 10(b)'s text

Under the statute's plain language, JCM "use[d] or employ[ed]" a "deceptive device or contrivance," 15 U.S.C. § 78j(b), when it represented to the market – including potential investors in JCG's stock – that JCM did not permit market timing in its funds, while at the same time permitting favored hedge funds to engage in market timing. Publicly disclosing that JCM allowed market timing in the Janus Funds

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ing before the Commission" *for the purposes of the Commission's rules on professional conduct before the Commission. Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6296, 6302 (Feb. 6, 2003). But such an attorney is still representing the adviser in preparing such materials. *See Implementation of Standards of Professional Conduct for Attorneys*, 67 Fed. Reg. 71,670, 71,679 (Dec. 2, 2002) ("In effect, an attorney employed by the investment adviser and representing the [mutual fund] before the Commission has joint clients."); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) ("In any complex securities fraud, . . . there are likely to be multiple violators"). In any event, in determining the legal sufficiency of the complaint, the Court is obliged to disregard those assertions by petitioners that seek to contradict the complaint's well-pleaded allegations that JCM made the misstatements in the prospectuses.

would have discouraged investments in those funds, resulting in lower management fees and reduced revenues for JCM and JCG, with a corresponding negative effect on JCG's stock price. Petitioners' assertion (at 37-38) that imposing liability here is inconsistent with § 10(b)'s text, therefore, is incorrect.

Moreover, JCM's dissemination of the Funds' prospectuses, *see* App. 72a (¶ 38); App. 18a; JA413a (¶ 21), reinforces its culpability under § 10(b) as a primary violator. Section 10(b) and Rule 10b-5 prohibit not only making material misstatements but also engaging in deceptive conduct, as this Court has recognized. *See Stoneridge*, 552 U.S. at 158 ("Conduct itself can be deceptive"); 17 C.F.R. § 240.10b-5(a), (c).[12]

Even if one were to accept petitioners' (incorrect) assertion that the Janus Funds issued the prospectuses on their own, courts have recognized that an issuing corporation can violate § 10(b) and Rule 10b-5 by providing misleading information regarding its own operations to an independent market analyst with the intent that the analyst communicate that information to the public. *See, e.g., Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 373 (5th Cir. 2004); *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002); *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). Petitioners' assertion (at 33 n.6) that an automobile parts supplier is not responsible for a policy that it prepares and sup-

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[12] Although the Fourth Circuit concluded that it need not reach respondent's allegations of deceptive conduct under Rule 10b-5(a) and (c), *see* App. 35a-36a, it reversed the district court's judgment in its entirety, *see* App. 40a. Petitioners thus erroneously suggest (at 13, 40 n.8) that this Court cannot consider JCM's deceptive acts.

plies to a manufacturer for inclusion in the manufacturer's prospectus contradicts not only those cases but also this Court's decision in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). There, the Court affirmed a finding of primary liability against an accounting firm that prepared a portion of a company's registration statement. *See id.* at 378-79 & n.5, 387.

Indeed, petitioners appear (at 38 n.7) to accept the correctness of the analyst cases, except to the extent they suggest that the phrase "directly or indirectly" in § 10 modifies only the jurisdictional requirement ("by the use of any means or instrumentality of interstate commerce"). But § 10's grammar and structure make clear that those adverbs modify the infinitive verbs "[to] use or employ," not the prepositional phrase containing the jurisdictional requirement. *See* 15 U.S.C. § 78j. Ultimately, petitioners' arguments about § 10(b)'s language fail to support their contention that JCM did not "make" misstatements within the meaning of Rule 10b-5, the SEC's authoritative implementation of § 10(b).

2. The SEC's interpretation of the term "make" in Rule 10b-5 is consistent with the regulation

Petitioners do not contend that Rule 10b-5's prohibition on "mak[ing]" misstatements is an unreasonable interpretation of § 10(b). Any such contention would be inconsistent with this Court's cases. *See, e.g., Stoneridge*, 552 U.S. at 157 ("Rule 10b-5 encompasses only conduct already prohibited by § 10(b).").

Instead, petitioners rely on a 72-year-old Fourth Circuit opinion to assert that "[t]he accepted meaning of 'make' in the context of 'making a statement' is . . . 'to put forth; give out; deliver; as to make a speech.'" Pet. Br. 40 (quoting *Reass v. United States*, 99 F.2d 752, 755 n.4 (4th Cir. 1938)). But accepted

dictionary definitions, to which this Court ordinarily turns in identifying the plain meaning of statutory and regulatory language, *see, e.g.*, *National Ass'n of Home Builders*, 551 U.S. at 668; *Smith*, 508 U.S. at 228, are not so narrowly drawn. They define "make" to mean "[t]o cause to exist, appear, or occur" or "to create." *Webster's Second* at 1485; *Webster's Third* at 1363; *see supra* Part I.A.[13] Thus, "[t]he word 'make,' in reference to a statement, ordinarily refers to one authoring the statement or repeating it as his own." *Tambone*, 597 F.3d at 450-51 (Boudin, J., concurring). That is particularly true in the context of written (as opposed to oral) statements, such as the prospectuses at issue here. Given the ample support for the SEC's definition of the term, petitioners certainly cannot show that the Commission's interpretation is "plainly erroneous or inconsistent with the regulation." *Coeur Alaska*, 129 S. Ct. at 2470 (internal quotations omitted).

Petitioners' presidential-speechwriter analogy (at 41) is thus inapt. Unlike petitioners' analogy, JCM wrote the misstatements regarding market timing, described JCM's own conduct in supposedly precluding market timing, disseminated those statements, and expressed the prospectus statements in a form that the investing public reasonably attributed to

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[13] Petitioners' assertion (at 41) that "to make a statement" means "to state" is not more helpful to them, because the meaning of the verb "state" in the context of a written document is consistent with the SEC's interpretation of "make" as to create or cause to exist. *See Webster's New International Dictionary* 2461 (2d ed. 1950) ("[t]o express the particulars of").

JCM. JCM is thus no mere speechwriter (or law clerk or courier, *cf.* Pet. Br. 42).[14]

Petitioners' reliance (at 38-39) on § 18 to argue that "make" cannot mean "cause to be made" is unavailing. Even within the same act, the presumption that a word has identical meanings in different provisions is "not rigid." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (internal quotations omitted). Petitioners cite no authority for applying such a presumption here with respect to a word contained in, on the one hand, a statutory section and, on the other hand, an SEC regulation implementing a different statutory provision. Nor is this a case in which the defendant caused *another* person to make a misstatement. Rather, the Court can resolve this case by holding that a defendant "makes" a false statement actionable under § 10(b) and Rule 10b-5 when the defendant creates or causes a misstatement to exist, falsely describes its own conduct, and disseminates that statement.[15]

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[14] For similar reasons, the concerns of petitioners' *amici* regarding the potential liability of auditors and outside counsel are unfounded. Imposing liability on an entity that creates and disseminates statements misrepresenting its own conduct would not affect the exposure of auditors, outside counsel, or other service providers.

[15] Petitioners' argument (at 42-43) that one does not violate § 10(b) and Rule 10b-5 by preparing, filing, and disseminating a misstatement is unavailing. As petitioners admit (at 42), to say that an entity "prepared" a statement is another way of saying that it created that statement or caused it to exist, which suffices for liability under the SEC's reasonable construction of Rule 10b-5. *See supra* Part I.A. Further, judicially noticeable facts contradict petitioners' assertion that JCM did not "file" the prospectuses, *see supra* Part I.B.3, and petitioners concede (at 43) that JCM disseminated the prospectuses on the Janus website, *see also* JA413a (¶ 21). Although petitioners dispute that

3. Petitioners' interpretation of "make" creates a roadmap for securities-fraud violators

Petitioners' interpretation of the term "make" in Rule 10b-5, which would apply in SEC enforcement proceedings and criminal prosecutions as well as private actions, would open a significant loophole in the securities laws. If adopted by this Court, petitioners' approach would immunize companies that create and disseminate false statements about their operations for the purpose of defrauding investors, so long as the statements are issued in another's name. It would encourage companies to form shell corporations that would then issue public statements about the affiliated corporation's activities. That mechanism would shield unscrupulous actors from private securities-fraud suits and SEC enforcement actions, because the Commission also must show that the defendant made a misstatement to establish a Rule 10b-5(b) violation.

Nor is it clear that the SEC could bring an enforcement action on an aiding-and-abetting theory against an entity that creates and disseminates misstatements issued in another entity's name. Courts have held that aiding and abetting requires a primary violator of the statute. *See, e.g., SEC v. DiBella*, 587 F.3d 553, 566 (2d Cir. 2009) ("the government must prove . . . the existence of a securities law violation by [a] primary (as opposed to the aiding and abetting) party") (internal quotations omitted). But there may be no primary violator in the case of a corporate shell with no employees whose only purpose is to issue public statements created by others.

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filing or disseminating alone suffices for liability, they do not (and cannot) contend that those facts are irrelevant in determining whether JCM is a primary violator.

Cf. Ernst & Ernst, 425 U.S. at 188 (plaintiff must show "intent to deceive, manipulate, or defraud on the part of the defendant"); *In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3 (companion case in the MDL proceeding dismissing claims against the Janus Funds arising out of the same facts as this case). The Commission has explained that its ability to enforce aiding-and-abetting liability is insufficient to police the securities markets. *See* SEC *PIMCO* Br. at 4.

Contrary to petitioners' assertions (at 37, 41), neither the First nor Second Circuit has rejected the interpretation of "make" articulated here. In *Tambone*, the First Circuit rejected the proposition that "one may 'make' a statement within the purview of the rule by merely using or disseminating a statement *without regard to the authorship of that statement*" and where the statement did not involve the defendant's own conduct. 597 F.3d at 438 (emphasis added). Both the court's opinion and the concurrence indicated that "make" means "create [or] cause," "compose," and "cause (something) to exist," *id.* at 443 (internal quotations omitted; alteration in original); *see id.* at 450-51 (Boudin, J., concurring), all of which are consistent with respondent's interpretation of "make." In *Pacific Investment Management Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010) ("*PIMCO*"), the Second Circuit held that a statement must be "attributed" to the defendant to be actionable under § 10(b), even if the defendant "drafted" it. *Id.* at 151, 157-58. That is quite different from saying that a defendant who creates a statement does not make it (and it is erroneous in any event, *see infra* Part II).

4. Petitioners mischaracterize the Fourth Circuit's decision and the complaint

a. In criticizing the Fourth Circuit's reasoning (at 34-36), petitioners attack a straw man. The Fourth Circuit did not hold JCM liable merely for "helping" the Janus Funds make misstatements. Rather, the court reviewed the allegations in the complaint and referenced documents as a whole, *see* App. 17a-18a, as this Court's cases require, *see Tellabs*, 551 U.S. at 322. The court below focused on the allegations that petitioners "'wrote and represented [their] policy against market timers'" and "'represented that [their] mutual funds were designed to be long-term investments for "buy and hold" investors and were therefore favored investment vehicles for retirement plans.'" App. 17a (quoting complaint; alteration in original). The court explained that, "[a]ccording to the complaint, [petitioners] made these representations by 'caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public.'" App. 17a-18a (quoting complaint; alteration in original). The court accordingly held that petitioners "*made* the misleading statements contained in the [prospectuses]." App. 18a.

The Fourth Circuit's statements that "JCG and JCM helped draft" and "participat[ed] in the preparation of the prospectuses" (App. 17a, 18a) are fully consistent with this Court's recognition that multiple entities can make a single misstatement. *See Central Bank*, 511 U.S. at 191 ("In any complex securities fraud, . . . there are likely to be multiple violators").[16]

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[16] Contrary to petitioners' assertion (at 35), the decision below also is fully consistent with *Stoneridge*, which did not address what it means to "make" a misstatement. The defen-

Moreover, the court plainly recognized that the preparation of the prospectuses could not have been performed by the Funds, for it acknowledged respondent's allegations that, "[a]s investment advisor to the various Janus funds, JCM 'is responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds'" and that, "'[a]s a practical matter,' JCM runs the Janus family of funds." App. 5a (quoting complaint; second alteration in original); *see* App. 27a (JCM "'furnishes . . . administrative, compliance and accounting services for the funds'") (quoting complaint); *see also* App. 29a ("[a] mutual fund does not operate on its own or employ a full time staff") (internal quotations omitted).

b. Similarly, petitioners' assertion (at 32) that the complaint fails adequately to allege that JCM made misstatements disregards the complaint's allegations and fails to consider that document "in its entirety," *Tellabs*, 551 U.S. at 322. The complaint states that, "[a]s described herein, during the Class Period, [JCM] made . . . a series of materially false or misleading statements about Janus' business, operations and operating policies." App. 110a (¶ 123). That "series of" misstatements, which is described in the complaint, included the statements in the prospectuses that the Janus Funds "were 'not intended for market timing or excessive trading' and [that] 'Janus had measures in place to stop the trading.'" App. 72a (¶ 38).

The complaint also alleges that JCM "wrote and represented [the] policy against market timers," App. 69a (¶ 31), and that JCM "caused mutual fund prospectuses to be issued for Janus mutual funds," App.

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dants in that case "had no role in preparing or disseminating" the false financial statements. 552 U.S. at 155.

60a (¶ 6). Especially when considered together with the complaint's allegations that JCM "is responsible for the . . . day-to-day management" of the Funds, App. 59a (¶ 2), including "administrative, compliance and accounting services for the funds," App. 65a (¶ 18), the complaint plainly alleges that JCM made the misstatements. *See supra* Part I.B.1. Moreover, petitioners erroneously ignore "documents incorporated into the complaint by reference" and "matters of which a court may take judicial notice," *Tellabs*, 551 U.S. at 322 – materials that confirm JCM's liability here. *See supra* Part I.B.2-3.[17]

Petitioners assert (at 26, 33, 54) that the investment advisory agreements between JCM and the Funds provide that they do not cover preparing prospectuses. But the advisory agreement that petitioners proffer, which does not apply to any of the Funds addressed in the complaint, provides only that the investment advisory *fee* payable to JCM under that agreement does not cover, among other things, the

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[17] Contrary to petitioners' assertion (at 32), the complaint also alleges where (in the prospectuses) and to whom (the investing public) JCM's misstatements regarding market timing were made. *See supra* Part I.B.1. To the extent petitioners assert (at 31) that the complaint fails for lack of particularity, that issue is not properly before this Court, because petitioners failed to present it in their petition for a writ of certiorari, which cites neither Federal Rule of Civil Procedure 9(b) nor the pleading requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *See* Sup. Ct. R. 14.1(a); *see also, e.g., Beck v. PACE Int'l Union*, 551 U.S. 96, 104 n.3 (2007) (refusing to address an issue on which petitioners did not seek certiorari). In any event, for the reasons explained in the text, the complaint pleads fraud with particularity. The SEC, which also is subject to heightened pleading requirements under Rule 9(b) (*see Tambone*, 597 F.3d at 442), agrees. *See* U.S. Cert. Br. 11-12.

"costs involved in" preparing prospectuses. *See* Pet. Br. Add. 4a-5a. That provision says nothing about *who* wrote and prepared the Funds' prospectuses, which the complaint alleges was JCM.

D. Petitioners' Claim That JCM Is A Secondary Actor Is Incorrect And Irrelevant

Petitioners' argument (at 15-29) that JCM is a secondary actor is incorrect because JCG, JCM's parent, is *the issuer* of the securities in which respondent transacted. And it is beside the point because, as petitioners recognize, even secondary actors can be liable when, as here, their conduct meets the elements of a private § 10(b) action. Moreover, JCM is no mere "service provider," as petitioners claim.

1. Respondent is suing the issuer of the securities it purchased, a holding company, for primary violations committed by that company's wholly owned operating subsidiary

Respondent purchased shares of JCG and is suing JCG, and its wholly owned operating subsidiary JCM, for their deceptive and fraudulent conduct in connection with the purchase and sale of JCG securities. This case therefore does not involve an investor suing one of the issuer's service providers – such as an investment banker, outside auditor, or outside counsel – for misstatements made by the issuer. Indeed, because this case concerns *primary* actors and *primary* violators, it lies at the heart of § 10(b) and Rule 10b-5.

Contrary to Janus's repeated assertions (at 15-16), it makes no difference in determining primary liability that the misstatements at issue were contained in prospectuses for the Janus Funds, rather than JCG's own prospectuses. As petitioners' own authority explains, a "secondary actor" is a party that is "not

employed by the issuing firm *whose securities are the subject of allegations of fraud*." *PIMCO*, 603 F.3d at 148 n.1 (emphasis added). Thus, an entity's status as a primary actor turns on whether it issued the shares in which the plaintiff invested, not whether the misstatements at issue were made "in the offering materials for [the defendant's] securities," as petitioners assert (at 22 n.3). Here, JCG issued the securities that "are the subject of allegations of fraud." *PIMCO*, 603 F.3d at 148 n.1. JCM does not become a secondary actor with respect to statements it made to investors regarding its own conduct simply because the prospectuses marketed shares in the Funds rather than shares in JCG. *See also infra* note 20.

In any event, petitioners concede (at 14) that even a so-called "secondary actor" can be held liable if all the elements of a private § 10(b) action are satisfied. *See Stoneridge*, 552 U.S. at 158. As the Court explained in *Central Bank*, "*[a]ny person or entity* . . . who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator." 511 U.S. at 191 (emphasis added); *see also Herman & MacLean*, 459 U.S. at 386 n.22.[18] Accordingly, whether petitioners are considered primary or secondary actors is immaterial here.

For similar reasons, petitioners erroneously accuse (at 14-15, 30-31) the Fourth Circuit of "expand[ing] the implied right of action" and "ma[king] new law" in conflict with this Court's analysis in *Stoneridge*. The Fourth Circuit recognized that respondent was required to plead all of the elements of a private

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[18] In *Central Bank*, the plaintiffs conceded that the defendant "did not commit a manipulative or deceptive act within the meaning of § 10(b)." 511 U.S. at 191.

§ 10(b) action, and the court held that it had done so. App. 35a-36a. Courts regularly have imposed liability in circumstances analogous to those here. For example, courts of appeals have held that a corporate officer can be liable for having "made" misstatements, even if those misstatements are issued in the corporation's name. *See, e.g.*, *McConville*, 465 F.3d at 787-88; *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 75-76 (2d Cir. 2001); *see also Southland*, 365 F.3d at 365. The complaint's allegations regarding the captive relationship between JCM and the Janus Funds demonstrate that JCM plays at least as great a role in the Funds' operations as a corporate officer. *See, e.g.*, App. 71a (¶ 34) (JCM "runs" the Janus Funds); *see also* Brief for the SEC as Amicus Curiae in Support of Affirmance at 10, *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984) (No. 82-1200) ("SEC *Daily Income Fund* Br.") ("[T]he adviser of [a mutual fund] typically exercises at least as much control over the [fund] as internal management does in other corporations."); *cf. Wolfson*, 539 F.3d at 1251, 1260-61 (non-employee consultant who "played a significant role within the company" liable for misstatements in SEC filings he prepared, even though they "were issued in [the corporation's] name" and he "did not sign, certify, or physically file" them); *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir. 2005).

The decision below thus is fully consistent with a judicial reluctance to extend liability in private actions to classes of actors that were not liable under the law as it existed when Congress enacted the PSLRA. Indeed, *petitioners*, not respondent, seek to alter the § 10(b) action. Petitioners urge the Court to confer legal immunity on issuers that make mis-

statements through nominally separate entities that they control. Such a rule would create a new, significant loophole in § 10(b) and Rule 10b-5.

Nor does respondent advocate a "view of primary liability [that] makes any aider and abettor liable under § 10(b) if he or she committed a deceptive act in the process of providing assistance," *Stoneridge*, 552 U.S. at 162, as petitioners claim (at 17-18). JCM did not merely "provid[e] assistance"; it made the misstatements falsely describing its own conduct. In *Stoneridge*, by contrast, the defendants' deceptive acts were never "communicated to the public." 552 U.S. at 159. More fundamentally, the issuer in *Stoneridge*, not the defendants, "misled its auditor and filed fraudulent financial statements." *Id.* at 161. The defendants in *Stoneridge* "had no role in preparing or disseminating" those statements, *id.* at 155, and nothing [the defendants] did made it necessary or inevitable for [the issuer] to record the transactions as it did," *id.* at 161. Here, JCM not only "made it . . . inevitable" that the prospectuses would contain misstatements regarding its market-timing policy, but also "prepar[ed] [and] disseminat[ed]" those misstatements describing its own misconduct.

2. JCM is not comparable to an independent service provider such as an auditor or outside attorney

To support the claim that JCM is a mere "service provider" for the Funds, petitioners rely heavily (at 21-29) on the regulatory regime under the Investment Company Act of 1940 ("ICA"). The ICA, however, regulates the relationship between investment advisers and the funds they create with the goal of mitigating – not eliminating – the "conflicts of interest" inherent in the structure of a typical fund.

Jones, 130 S. Ct. at 1422 (internal quotations omitted). Nothing in the ICA renders implausible – or licenses courts to ignore – respondent's well-pleaded allegations regarding JCM's role in creating and disseminating the misstatements in the Funds' prospectuses. *See supra* Part I.B.1. It would be improper for this Court to indulge petitioners' effort to dispute facts that must be assumed as true given the current procedural posture of this case, particularly since SEC orders and judicial opinions confirm respondent's allegations, *see supra* Part I.B.3.

Moreover, the regulatory authority on which petitioners rely to support JCM's status as a mere service provider in fact supports respondent. In the SEC final rule that petitioners cite (at 21), the Commission explained that, "[u]nlike most business organizations, . . . mutual funds are typically organized and operated by an investment adviser *that is responsible for the day-to-day operations of the fund*." 66 Fed. Reg. at 3735 (emphasis added). It further explained that, "[a]s a result of their extensive involvement, and the general absence of shareholder activism, investment advisers typically *dominate* the funds they advise." *Id.* at 3735 n.3 (emphasis added). That is consistent with other SEC statements regarding the relationship between investment advisers and their captive mutual funds. *See* SEC *Daily Income Fund* Br. at 10; *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977) ("[T]he term 'investment adviser' is to some extent a misnomer" because "[t]he so-called 'adviser' is no mere consultant. He is the fund's manager. Hence the investment adviser almost always controls the fund.") (citations omitted), *petition for review granted in part on other grounds, denied*

in part, and remanded, *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd*, 450 U.S. 91 (1981).

Contrary to petitioners' assertion (at 23), the ICA does not obligate mutual funds to *prepare* their own prospectuses. *See* 15 U.S.C. §§ 80a-8(b) (providing that every fund "shall file" registration statement), 80a-24(a) (providing that a fund "may file" ICA registration statement with SEC in lieu of registration statement under Securities Act of 1933). Given that the Janus Funds have no employees of their own, they could not have complied with such an obligation in any event. *Cf. In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3.

Moreover, the ICA's requirement that the Janus Funds file prospectuses with the SEC does not relieve JCM of responsibility for statements it made in those prospectuses concerning its own conduct. Indeed, petitioners reject (at 42) the notion that filing a prospectus constitutes making the statements in the prospectus; in any event, the SEC has found that JCM filed the prospectuses, *see supra* Part I.B.3. Likewise, that the Funds' board assertedly "reviewed and approved" the prospectuses (Pet. Br. 25) does not mean that it alone created – or made – the statements in those prospectuses. Here, the statements involved actions that JCM pledged to take – to ensure that the Funds did not engage in market timing. Those actions fell exclusively within JCM's role in handling the Funds' day-to-day operations.

Petitioners also suggest (at 26-27) that investment advisers should be immune from liability for securities fraud because the ICA contains "broad provisions" prohibiting fraud by investment advisers. But the provisions on which petitioners rely protect *mutual fund* investors, not investors in the *adviser's*

stock. *See* 15 U.S.C. § 80b-6 (prohibiting advisers from defrauding a "client"); *see also Jones*, 130 S. Ct. at 1422 (ICA "created protections for *mutual fund shareholders*") (emphasis added). If petitioners prevail here, JCG's investors will be left with no remedy.[19]

II. THE COMPLAINT ALLEGES RELIANCE

A. Under *Basic*, Reliance On JCM's Public, Material Misstatements Is Presumed

Although § 10(b) and Rule 10b-5 do not by their terms contain a reliance requirement, this Court has held that, to establish liability in a private § 10(b) action, a plaintiff must show that it relied on the defendant's misconduct. *See Stoneridge*, 552 U.S. at 159; *Basic*, 485 U.S. at 243. There is, however, "more than one way to demonstrate the causal connection." *Basic*, 485 U.S. at 243.

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[19] Petitioners' assertion (at 28-29) that respondent would need to amend its complaint to add a § 20(a) controlling-person claim against JCM misunderstands respondent's theory. JCM is liable for its own misconduct – making misrepresentations in the prospectuses about its own actions in managing the Funds' operations. *Cf.* SEC *Klein* Br. at 12 n.5 ("[A] person can be a creator of a misrepresentation without controlling the person in whose name the misrepresentation is issued."). Respondent is not attempting to hold petitioners liable for the Funds' actions.

Likewise, petitioners' suggestion (at 23 n.4) that respondent seeks to pierce the corporate veil is incorrect. The corporate veil need not be pierced to recognize that, by creating and disseminating misstatements about its own conduct, JCM made those misstatements, even though those statements assertedly were published under the name of the Funds. In any event, "the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629-30 (1983).

"[U]nder the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public," because it can then "be assumed that an investor who buys or sells stock at the market price relies upon the statement." *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247). The fraud-on-the-market doctrine rests on the premise that, "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Basic*, 485 U.S. at 241 (internal quotations omitted). Investors thus rely on that "market price." *Id.* at 244 (internal quotations omitted).

Here, the complaint alleges that JCM made misstatements in the prospectuses (*see supra* Part I), which indisputably "bec[a]me public" during the class period. *Stoneridge*, 552 U.S. at 159. Further, the misstatements in those prospectuses regarding JCM's policy with respect to market timing were material. App. 61a (¶ 7); *see also* App. 109a-110a (¶¶ 121-125); *Basic*, 485 U.S. at 232 (information is "material" if a "'reasonable investor'" would consider it "significant"). When public disclosures revealed that JCM in fact had been *permitting* certain hedge funds to engage in market timing in the Janus Funds, massive withdrawals of assets from those Funds ensued. App. 34a. Those redemptions from the Funds directly reduced JCG's profitability and affected its stock price adversely because JCG's revenues depended almost entirely on fees determined as a percentage of assets under management in the Funds. *Id.* Indeed, in the days following the New York Attorney General's disclosures regarding market timing in the Funds, JCG's stock price declined precipitously. App. 34a-35a. Reasonable investors,

therefore, considered information regarding JCM's misstatements with respect to its market-timing policy to be significant. Moreover, the Funds' prospectuses were the best source of information about JCG's primary products – the funds it created and managed – and reasonable JCG investors could be expected to be aware of their contents.

Accordingly, under the fraud-on-the-market doctrine, which the Court reaffirmed in *Stoneridge*, "reliance is presumed" because it can "be assumed that" the class members who purchased shares in JCG after the public disclosure of the prospectuses "relie[d] upon" the material misstatements regarding market timing in those prospectuses. *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247).

B. The Fraud-On-The-Market Doctrine Applies To JCM's Misstatements

Relying heavily on *Central Bank* and *Stoneridge*, petitioners contend (at 44-49) that the fraud-on-the-market doctrine is inapplicable here, because JCM is a "secondary actor." But JCM is not a secondary actor. *See supra* Part I.D. Instead, it is the wholly owned operating subsidiary of the "issuing firm whose securities are the subject of allegations of fraud." *PIMCO*, 603 F.3d at 148 n.1. Consequently, whatever the merits of the rule petitioners advocate for secondary actors, they receive no benefit from it.

Further, petitioners' assertion that the fraud-on-the-market doctrine does not apply "in cases against defendants who did not themselves speak to the market," Br. 49, is unpersuasive because JCM *did* speak to the market. It made misstatements regarding its market-timing policy in publicly disclosed prospectuses. *See supra* Part I. For that reason, this case is fundamentally different from *Central Bank*

and *Stoneridge*. In those cases, reliance could not be shown because the defendants' misconduct was never disclosed to investors.

1. In *Central Bank*, bond purchasers sued the issuer, the underwriters, and the trustee for the bond issue. 511 U.S. at 167-68. The purchasers alleged that the issuer and the underwriters violated § 10(b) by using an inaccurate appraisal of the proposed collateral for the bonds to market the bonds. *Id.* The trustee (Central Bank) was alleged to have known of concerns about the accuracy of the appraisal and to have failed to act on those concerns before the closing of the bond sale. *Id.* Based on those facts, the plaintiff-purchasers "alleged that Central Bank was 'secondarily liable under § 10(b) for its conduct in aiding and abetting the fraud.'" *Id.* at 168. The Court held that § 10(b)'s text did not prohibit aiding and abetting and that the plaintiffs therefore had no claim against Central Bank. *See id.* at 177.

Having concluded that "this case concerns the conduct prohibited by § 10(b)" and that "the statute itself resolves the case," *id.* at 178, the Court nevertheless also considered other arguments for and against recognizing secondary liability in a private § 10(b) action, *id.* at 178-91. In that discussion, the Court stated that its reasoning was "confirmed" by the fact that recognizing aiding and abetting would impose liability without requiring proof of reliance. *Id.* at 180.

In *Central Bank*, there was no indication that the bond purchasers were aware of – let alone relied on – any statement or action by Central Bank. (Moreover, the bonds in *Central Bank* do not appear to have been traded on an efficient market, and the fraud-on-the-market doctrine thus would not have applied in

any event.) In addition, no actions by Central Bank made it necessary or inevitable for the issuer and underwriters to use the inaccurate appraisal.

In *Stoneridge*, the complaint alleged that Charter, a cable operator, conspired with its suppliers to increase its revenue by agreeing to pay the suppliers more for their products in exchange for the suppliers' agreement to purchase additional advertising time from Charter. 552 U.S. at 153-55. Charter filed with the SEC and disclosed to the public financial statements showing the artificially inflated revenue number. *Id.* at 155. The suppliers "had no role in preparing or disseminating Charter's financial statements," and "their own financial statements booked the transactions as a wash, under generally accepted accounting principles." *Id.*

The Court held that Charter's investors had not alleged the reliance element of a private § 10(b) claim against the suppliers. It explained that the suppliers' "deceptive acts were not communicated to the public" and that "[n]o member of the investing public had knowledge, either actual or presumed, of [the suppliers'] deceptive acts during the relevant times." *Id.* at 159. Noting that "reliance is tied to causation," the Court concluded that the defendants' "deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance. It was Charter, not [the suppliers], that misled its auditor and filed fraudulent financial statements; nothing [the suppliers] did made it necessary or inevitable for Charter to record the transactions as it did." *Id.* at 160-61.

Unlike the alleged misconduct in *Central Bank* and *Stoneridge*, therefore, JCM's misstatements regarding market timing were publicly disclosed in

the prospectuses, and those disclosures informed the investing public that JCM, as the investment adviser for the Janus Funds, would prohibit market timing in those Funds. It thus can "be assumed that" respondent and the members of the putative class "relie[d] upon" those statements. *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247).

2. In both *Central Bank* and *Stoneridge*, there was at least one more directly culpable party. In *Central Bank*, the bond purchasers alleged only that Central Bank "was '*secondarily liable* . . . for its conduct in *aiding and abetting* the fraud.'" 511 U.S. at 168 (emphases added). And, in *Stoneridge*, "[i]t was Charter, not [the suppliers], that misled its auditor and filed fraudulent financial statements." 552 U.S. at 161. Here, by contrast, JCM, the wholly owned operating subsidiary of the issuer of the securities that respondent purchased, was the party directly responsible for both making the public statements in question and ensuring the falsity of those statements through its day-to-day management of the Funds. No facts support the Funds being more culpable than JCM. In dismissing private § 10(b) claims against the Funds in a related case, the district court observed that the Funds are a "*victim[]*" of the fraudulent scheme here alleged. *In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3.

Petitioners incorrectly assert (at 48) that "the statements in *Stoneridge* – the issuer's financial results – *were* publicly disclosed." But the defendant-suppliers in *Stoneridge* did not *make* those false public statements. Instead, "[i]t was Charter, not [the suppliers], that . . . filed fraudulent financial statements," and no actions by the suppliers "made it necessary or inevitable for Charter to record the

transactions as it did." 552 U.S. at 161. The alleged misconduct of the suppliers – agreeing to the inaccurate supply contracts – was never disclosed to the public. *Id.* at 159-60.

In sum, petitioners' contention that the fraud-on-the-market doctrine should not be applied in cases in which the defendant's misconduct is not publicly disclosed is irrelevant here, because JCM publicly misstated its policy regarding market timing in the prospectuses and JCG investors acted in reliance on those misstatements.[20]

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[20] Petitioners also suggest (at 45 n.10) that there is not "a connection between the misrepresentation or omission and the purchase or sale of a security." *Stoneridge*, 552 U.S. at 157. The district court did not accept that argument, *see* App. 49a n.4, and petitioners did not raise it in their petition for a writ of certiorari. It thus is waived and not properly before this Court. *See* Sup. Ct. R. 14.1(a); *supra* note 17.

In any event, petitioners are incorrect. This Court has articulated a broad interpretation of the "in connection with" language in § 10(b) and Rule 10b-5, requiring only that the fraud "coincide" with a securities transaction. *Zandford*, 535 U.S. at 825. It also has held that "one asserting a claim for damages based on the violation of Rule 10b-5 must be either a purchaser or seller of securities." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975). Both requirements are met here because respondent and the members of the putative class purchased shares in JCG at a market price that incorporated JCM's misrepresentations regarding its market-timing policy. *See In re Ames Dep't Stores Inc. Stock Litig.*, 991 F.2d 953, 963 (2d Cir. 1993) ("[A] 10b-5 action may be brought when one, in reliance upon false and misleading statements in a registration statement, purchased securities which were not the subject of that registration statement.") (citing *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951) (Frank, J.)); *see also Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156 (2d Cir. 1998) (Winter, C.J.).

C. Direct Attribution Is Not Necessary To Establish Reliance

Petitioners also contend (at 49-53) that, even where a defendant has made public misstatements, the fraud-on-the-market doctrine should not be applied unless those statements were "expressly," "contemporaneously," and "directly" "attributed" to the defendant. They base that contention on the assertion (at 51) that, without such attribution, "a necessary premise of the *Basic* presumption" – "that the market price for the relevant stock reflects *the defendant's* misstatement" – is lacking.

1. Petitioners misconstrue *Basic*. Nothing in that decision suggests that the presumption depends on the market knowing the true *identity* of the person making the public misstatement. Rather, *Basic* makes clear that the market price incorporates "information" about "the company and its business," so long as that information is "material." 485 U.S. at 241 (internal quotations omitted). Thus, the key under *Basic* is the *materiality* of the information in question, not the identity of the true source of that information. *Cf. In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008) ("[T]he premise of *Basic* is that, in an efficient market, share prices reflect 'all publicly available information, and, hence, *any* material misrepresentations.' It thus does not matter, for purposes of establishing entitlement to the presumption, whether the misinformation was transmitted by an issuer, an analyst, or anyone else.") (quoting *Basic*, 485 U.S. at 246) (emphasis added in *Salomon*).

To be sure, an entity to which information is publicly attributed could have so little credibility in the market that the information would not be considered

"material." But, assuming for the sake of argument that JCM's misstatements about market timing were publicly attributed only to the Funds, a reasonable investor in JCG nonetheless would have considered the Funds' representations that they do not tolerate market timing to be significant. Dishonesty with respect to such representations would harm JCM – through redemptions in the Funds that would reduce JCM's management fees (thereby diminishing JCG's revenues) – which JCG's shareholders had an obvious interest in avoiding.

2. Contrary to petitioners' suggestion (at 30) that liability without attribution is unprecedented, courts regularly impose liability on, for example, corporate insiders for misrepresentations issued in the corporation's name. *See supra* p. 37. The cases on which petitioners rely (at 49-50) are inapt because they all involved claims against "secondary actors" – not issuers of the securities in which the plaintiff transacted. *See PIMCO*, *supra* (outside law firm); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001) (outside accounting firm, outside law firm); *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998) (outside accounting firm).[21] And those courts expressly limited the direct-attribution requirement they created to cases against "secondary actors."[22] Thus,

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[21] Petitioners also cite (at 50) *Wolfson*, but the Tenth Circuit there rejected an attribution requirement in an SEC enforcement proceeding and noted that it had "never adopted an attribution requirement in a private securities case" either. 539 F.3d at 1259.

[22] *See PIMCO*, 603 F.3d at 148 ("We hold that *a secondary actor* can be held liable . . . only for false statements attributed to the secondary-actor defendant at the time of dissemination.") (emphasis added; footnote omitted), 158 n.6 (leaving open whether direct-attribution requirement would apply to "claims

none of those cases involved an effort by an issuer (JCG) and its wholly owned operating subsidiary (JCM) to avoid liability for misstatements made by the operating subsidiary regarding its own conduct on the ground that those misstatements allegedly were publicly attributed only to a nominally separate entity controlled by the subsidiary (the Funds).

Further, *Wright* is inapt for the additional reason that the defendant in that case, an outside auditor, merely "orally approv[ed]," 152 F.3d at 171 - and did not "make" – the press release, which stated that the information in it was "unaudited." *Id.*; *see id.* at 175 ("Ernst & Young neither directly *nor indirectly* communicated misrepresentations to investors" and, therefore, "the amended complaint failed to allege that Ernst & Young *made*" an actionable misstatement) (emphases added). Similarly, in *Ziemba*, the investor alleged only that the law firm provided "substantial *assistance* in the alleged fraud" and that the accounting firm "misadvis[ed]" the issuer regarding whether its financial results should have been consolidated with those of a subsidiary. 256 F.3d at 1205, 1207 (emphasis added).

The *PIMCO* opinion is unpersuasive because the court merely asserted that reliance on a defendant's misconduct cannot be established without attribution. *See* 603 F.3d at 156 ("Attribution is necessary to show reliance."). But, like petitioners, the Second Circuit never explained why knowledge of an entity's true *identity* is necessary to rely on that entity's

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against corporate insiders"); *Ziemba*, 256 F.3d at 1205 (addressing a case against "a secondary actor, such as a lawyer or an accountant"); *Wright*, 152 F.3d at 171 (limiting holding to "circumstances" of outside auditor's "private approval" of "information contained in" issuer's press release).

statement. As the United States explains, an investor "may rely on a defendant's statements . . . without knowing that they were made by the defendant." U.S. Cert. Br. 15 n.6. Further, under *Basic*, which the *PIMCO* court did not cite, reliance is presumed where publicly disclosed information is material, regardless of its attributed source. For the same reasons, the Fourth Circuit erred in adopting an attribution requirement in this case. App. 18a-24a.

3. Creating a direct-attribution requirement would disserve the purposes of the federal securities laws. Congress passed the Exchange Act to ensure "honest securities markets and thereby promote investor confidence" and "to achieve a high standard of business ethics in the securities industry." *Zandford*, 535 U.S. at 819 (internal quotations omitted). Imposing a direct-attribution requirement in § 10(b) actions would undermine those goals by enabling persons to mislead the securities markets without fear of liability so long as they avoid express, contemporaneous attribution for their misstatements. That could include persons who speak anonymously or use a false identity.[23] Even if such a requirement applies only in private actions – despite petitioners' suggestion (at 44 n.9) that it should apply to the SEC as well – it would reduce deterrence of fraud and weaken enforcement of § 10(b). *See* SEC *PIMCO* Br. at 14 ("An attribution requirement, by allowing a person who created a false or misleading statement to escape primary liability because that person acted anonymously or in another person's name, would

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[23] *See* SEC *PIMCO* Br. at 15 ("This concern is not merely theoretical. Wrongdoers in fact do distribute false and misleading statements that have a false name or no one's name attached to them . . . .")

shield significant misconduct from liability."); *see also Tellabs*, 551 U.S. at 313 ("meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions").[24]

D. In Any Event, The Fourth Circuit Correctly Concluded That A Reasonable Investor Would Have Attributed The Misstatements To JCM

Although direct attribution is not an element of a private § 10(b) action, the Fourth Circuit correctly concluded that any attribution requirement is satisfied here.[25]

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[24] JCG also is liable for omitting to disclose that certain investors were allowed to engage in market timing in the Janus Funds. An omission can be the basis for a private § 10(b) claim when the defendant has made an inaccurate, incomplete, or misleading disclosure. *See* 17 C.F.R. § 240.10b-5(b); *Oran v. Stafford*, 226 F.3d 275, 285-86 (3d Cir. 2000) (Alito, J.) ("[A] duty to disclose may arise when there is . . . an inaccurate, incomplete or misleading prior disclosure."). Here, JCG's April 29, 2003 press release, which is incorporated by reference in the complaint (App. 95a (¶ 81)), stated that JCM may impose a "1% redemption fee . . . on shares held [in the Janus Funds] for less than 90 days." JCG Form 8-K at 7 (Apr. 29, 2003). That statement was inaccurate, incomplete, or misleading because it implied, contrary to fact, that JCM did not allow favored investors to engage in market timing in the Funds. Because JCG omitted to state a material fact when it had a duty to disclose, respondent "need not provide specific proof of reliance." *Stoneridge*, 552 U.S. at 159 (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972)).

[25] Contrary to petitioners' assertion (at 53), respondent did not "concede[]" the attribution issue in the district court. Rather, respondent argued that, even if the prospectus statements were not directly attributable to petitioners, dismissal was unjustified. *See* Pl.'s Mem. in Opp'n to Defs.' Mot. To Dismiss Second Am. Parent Investor Class Compl. at 28-29 (filed Aug. 4, 2006).

1. The complaint describes the captive relationship between JCM as investment adviser and the Janus Funds: JCM "is responsible for the . . . day-to-day management" of the Funds, App. 59a (¶ 2), and it furnishes "administrative, compliance and accounting services for the funds," App. 65a (¶ 18). The prospectuses publicly identified JCM as the Funds' investment adviser and explained that JCM conducts the "day-to-day management" of the "business affairs" of the Funds as well as their "administrative" and "compliance" services. JA359a-360a. Further, the prospectuses were signed by "Janus," a name to which JCM reserved the right, JA275a, and JCM's and JCG's address appeared under the signature line in the prospectuses, JA359a, 403a, 431a. JCM also disseminated the prospectuses and marketed the Janus entities as a single firm – "Janus." App. 30a; JA413a (¶ 21).[26]

Accordingly, a reasonable investor would have attributed to JCM the statements in the prospectuses regarding its market-timing policy, as the Fourth Circuit correctly concluded. App. 27a-31a. Indeed, it is petitioners, not respondent, that seek to establish an "investment adviser exception" here; in denying the sufficiency of the complaint on this point, peti-

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[26] In light of the complaint's allegations regarding the structure of the mutual-fund industry, App. 70a-71a (¶¶ 34-35), petitioners err in asserting (at 54) that the Fourth Circuit's conclusion depends on an "unpleaded" understanding of the mutual-fund industry's structure. Petitioners' further assertion (at 54) that the Fourth Circuit's understanding of that structure is "incorrect" not only improperly fails to assume the truth of the complaint's factual allegations, *see Ashcroft*, 129 S. Ct. at 1950-51, but also contradicts the judicial and regulatory precedent recognizing the dominion that investment advisers typically exercise over their captive funds, *see supra* Parts I.B.2, I.D.2.

tioners seek a rule that "would allow advisers to avoid Section 10(b) liability simply by declining to state explicitly what the investing public already knows." U.S. Cert. Br. 16.

2. Petitioners incorrectly argue (at 54-56) that Congress has authorized the use of inferences only to plead scienter and that the Fourth Circuit's ruling contradicts that determination. Courts applying Rule 9(b) long have followed the general rule of pleading that a court may draw "reasonable inference[s]" (*Ashcroft*, 129 S. Ct. at 1949) from the facts alleged in determining whether the complaint states a plausible claim for relief. *See, e.g., Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993) ("When we review the grant of a motion to dismiss under Rule 9(b) or Rule 12(b)(6), we accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader."). Certainly, the facts giving rise to an inference of illegality must be pleaded with particularity. But that does not require courts to ignore the inferences that reasonably follow from those facts in determining the complaint's sufficiency. *Cf. United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854-55 (7th Cir. 2009) (Easterbrook, C.J.) (under Rule 9(b), "[i]t is enough to show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy"; "much knowledge is inferential – people are convicted beyond a reasonable doubt of conspiracy without a written contract to commit a future crime").

The PSLRA does not preclude courts from drawing inferences in resolving motions to dismiss in private § 10(b) actions. Instead, Congress heightened the pleading standard for a particular element of the pri-

vate action, requiring dismissal where the complaint does not support a "strong" inference of scienter. 15 U.S.C. § 78u-4(b)(2); *see also Tellabs*, 551 U.S. at 319-21 (describing that provision's origin). In requiring a "strong" inference for one element of the private § 10(b) action, Congress did not silently eliminate the drawing of inferences in determining the sufficiency of pleadings as to other elements. *See, e.g., ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) ("Under the PSLRA, as with any motion to dismiss under Rule 12(b)(6), we accept well-pleaded factual allegations in the complaint as true and view all reasonable inferences in the plaintiffs' favor.").

In any event, attribution need not be inferred in this case because the complaint pleads facts sufficient to show that a reasonable investor would have attributed the misstatements in the prospectuses regarding market timing to JCM. *See supra* Part II.D.1.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

This Court has never held that one company may be held primarily liable for statements that appear in the prospectus of a different company with separate ownership and independent governance. The decision below, by allowing such a suit to proceed, indisputably expands the private right of action implied under Rule 10b-5. A straightforward application of *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008)—which squarely held that further extension of the private right is for Congress, not the courts—requires reversal.

Lead plaintiff and its *amici* rest their bid for affirmance on the notion that, because investment advisers exercise a degree of operational "control" over their mutual-fund clients, they should be held liable for statements in their clients' prospectuses (*e.g.*, Resp. Br. 20; U.S. Br. 10)—even though "each mutual fund is in fact its own company." Pet. App. 71a ¶ 34. Indeed, lead plaintiff and its *amici* use the word "control" more than 100 times in discussing the contractual relationship between advisers and funds. This argument cannot be reconciled with the statutorily required independence between advisers and funds.

"Control" is a classic signifier of secondary liability. And indeed, Congress has enacted a secondary-liability provision—Section 20(a) of the Exchange Act—that expressly applies to those who "control" another company that commits a primary violation. 15 U.S.C. § 78t(a). Yet lead plaintiff and its *amici* provide zero substantive discussion of Section 20(a)—undoubtedly because lead plaintiff did not

(and could not) allege that petitioner Janus Capital Management LLC is a "controlling person" of the non-party Janus Funds.

The *availability* of "controlling person" liability in an appropriate case establishes that reversal would not create a securities-fraud "loophole" or a "roadmap" for violators. Resp. Br. 2, 38; *see also* note 4 and accompanying text, *infra*. Congress also authorized the SEC—but not private plaintiffs—to pursue secondary actors who provide "substantial assistance" to primary violators. 15 U.S.C. § 78t(e). Indeed, Congress very recently broadened the SEC's secondary-liability authority while again declining to confer similar authority on private plaintiffs (Pet. Br. 18), but lead plaintiff and the government have literally nothing to say about this legislation.

"The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994). Every argument advanced by lead plaintiff and its *amici* founders on that bedrock principle.

I. JCM Did Not "Make" The Statements In The Janus Funds' Prospectuses

The Fourth Circuit held that JCM could be liable under Rule 10b-5(b) for "*help[ing]* draft," or "*participating* in the writing" of, the Janus Funds' prospectuses. Pet. App. 17a-18a (emphases added). This holding is so obviously wrong that lead plaintiff and its *amici* do not even try to defend it.

Lead plaintiff limply asserts only that "[t]he Fourth Circuit's statements that 'JCG and JCM

helped draft' and 'participat[ed] in the preparation of the prospectuses' are fully consistent with this Court's recognition that multiple entities can make a single misstatement." Resp. Br. 32 (citation omitted). What the Court actually "recogni[zed]" is that a "complex securities fraud" may involve "multiple violators" (*Central Bank*, 511 U.S. at 191), which says nothing about whether "helpers" or "participators" may be held primarily liable for "making" statements in another company's prospectus—and the remainder of *Central Bank* makes clear that they cannot be. The government, recognizing as much, is forced to argue that the decision below should be affirmed "[n]otwithstanding the court of appeals' word choice." U.S. Br. 22.

Because the Fourth Circuit held that this case could proceed on grounds that *no one* is willing (or able) to defend before this Court, lead plaintiff is in the remarkable position of asking the Court to decide, in the first instance, whether the complaint adequately alleges that JCM "made" the challenged statements in the Janus Funds' prospectuses (Resp. Br. 11-12, 18-20)—a determination that neither the court of appeals nor the district court was able to make. Pet. App. 17a-18a, 50a n.5. Lead plaintiff's defense of its own complaint, however, is no more persuasive than the Fourth Circuit's.

A. The Complaint Does Not Adequately Allege "Making"

Lead plaintiff's case rests entirely on the theory that "JCM made misstatements regarding its market-timing policy in the Janus Funds' prospectuses." Resp. Br. 11. Lead plaintiff's brief collects, in a single paragraph, *all* of the allegations in the complaint that supposedly support this theory. Resp. Br. 19;

see also U.S. Br. 22; Pet. App. 17a-18a. But these allegations, even if proved, would not allow a reasonable trier of fact to accept lead plaintiff's theory. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

As lead plaintiff's collection confirms, the complaint identifies just *one* allegedly false statement for which petitioners were purportedly responsible: It alleges that "Janus"—defined as both JCG and JCM, but *not* the Janus Funds—"wrote and represented *its* policy against market timers." Pet. App. 69a ¶ 31 (emphasis added). The use of the possessive pronoun "its" in this critical allegation is obviously problematic for lead plaintiff, which repeatedly replaces the pleaded "its" with an unpleaded indefinite article in its merits brief. Resp. Br. 6, 11, 19 ("'wrote and represented [a] policy against market timers'"). The government takes even greater liberties in rewriting the complaint. U.S. Br. 5-6 ("The complaint alleges that the 'policy against market timers' ... was written and represented by 'Janus'").

Lead plaintiff is forced to alter its own complaint because the prospectuses do not recite *JCM*'s policy against market timing; rather, they set forth *the Funds*' policy: "*The Fund* may refuse purchase orders ... that *the Fund* believes are made on behalf of market timers." J.A. 141a (emphases added). Indeed, the only reference to JCM is in the third person: "The Fund *and its agents* may reject any purchase request ...." *Ibid.* (emphasis added). The complaint nowhere alleges that JCM "wrote" *the Funds*' policy—that is, the policy that actually appears in the prospectuses—or that JCM's own policy ended up in the Janus Funds' prospectuses.

Lead plaintiff tries to cover up this pleading deficiency by even more aggressive advocacy: According

to its merits brief, the complaint "alleges that JCM 'publicly issu[ed] false and misleading statements' *regarding the market-timing policy*" and "'made ... a series of materially false or misleading statements about' *that policy*." Resp. Br. 19 (quoting Pet. App. 109a-110a ¶¶ 122-123) (emphases added). As evidenced by lead plaintiff's careful placement of quotation marks, however, the italicized references to the market-timing policy appear only in its brief—they are not in the complaint. The complaint itself contains only boilerplate references to "misleading statements" without further specification, thus failing the most basic requirement of notice pleading (*see Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009)), not to mention the particularity required by the PSLRA and Rule 9(b). *See* Pet. 11-12.

Lead plaintiff had three chances to plead an actionable claim, but the operative complaint does not adequately allege that JCM "made" the challenged statements *in the Janus Funds' prospectuses*. That is because any such allegation would be false. *See* J.A. 503a-509a (interrogatory response explaining how the Janus Funds' prospectuses were in fact prepared). The Janus Funds' prospectuses were drafted by legal counsel to the Funds, and approved by the Funds' Board of Trustees before they were filed with the SEC. *Id.* at 507a. This *undisputed* evidence destroys the (unpleaded) gloss that lead plaintiff's new counsel have tried to put on the deficient complaint.

B. Lead Plaintiff Cannot Redefine "Make" To Reach The Activities Of Secondary Actors

Lead plaintiff—aided and abetted by the government—instead attempts to redefine the scope of primary liability, adopting for the first time in this

litigation the SEC's post-*Central Bank* view that "the term 'make' in Rule 10b-5(b) ... include[s] creating a statement or causing a statement to exist." Resp. Br. 16. But the complaint no more adequately pleads that JCM "created" the challenged statements than it does that JCM "made" them. In all events, the SEC's "creator" standard cannot be reconciled with the text of Section 10(b) or Rule 10b-5. *See PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010) ("reject[ing] the creator standard").

1.a. Section 10(b) imposes liability only on those who "use or employ ... any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b). "Creating" a statement for someone else to use is hardly equivalent to "us[ing] or employ[ing]" it. *See Bailey* v. *United States*, 516 U.S. 137, 143 (1995) ("use" connotes "active employment").

Whatever service provider may have "created" portions of an issuer's offering document, it is the issuer—and not the service provider—that "use[s] or employ[s]" that document to sell securities. The service provider is not "us[ing] or employ[ing]" the prospectus to sell securities (or for any other purpose)—either "directly or indirectly." *Compare* Pet. Br. 37-38 & n.7 *with* U.S. Br. 16 n.7. Thus, the issuer of the securities offered by a prospectus is the only person who "makes" statements in that prospectus.

Extending liability across this bright line requires an Act of Congress. And Congress knows perfectly well how to impose liability on non-issuers—including those who assist an issuer with its offering documents—when it chooses to do so. *See* SIFMA Br. 12-23. In Section 11 of the Securities Act, for instance, Congress created a private right of action against, *inter alia*, "any person whose profession

gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement." 15 U.S.C. § 77k(a)(4). Similarly, Section 34(b) of the Investment Company Act imposes liability for "any part of any [registration statement] which is signed or certified by an accountant or auditor in his capacity as such." *Id.* § 80a-33(b). And if a secondary actor "cause[s]" misleading offering documents "to be made" (*id.* § 78r(a)), then it can be held liable under Section 18 of the Exchange Act. *See* note 1, *infra*.

Indeed, in opposing certiorari, lead plaintiff noted that Congress was "contemplating a statutory solution" to the issues presented in this very case by "allow[ing] for a private civil action against a person that provides substantial assistance in violation of [the Exchange Act]." BIO 24. That statute, however, did not pass: Congress broadened the SEC's authority to sue secondary actors, but declined (once again) to give parallel power to private plaintiffs. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Z, 124 Stat. 1376, 1871 (2010); *see also* Chamber Br. 11-13. In their merits briefing, lead plaintiff and its *amici* say *nothing* about this most recent Act of Congress, instead asking this Court to do just what the Legislature left undone. Their entire position thus runs counter to this Court's holding that "[t]he decision to extend the cause of action is for Congress," not the courts. *Stoneridge*, 552 U.S. at 165.

Congress *could* have enacted a provision making investment advisers—or any other service provider—guarantors of their clients' prospectuses, or it could have authorized private claims against secondary actors. It did neither. The attempt by lead plaintiff

and the SEC to overturn these legislative decisions by rewriting the language of Rule 10b-5 should be rejected.

b. Nor is the SEC's "creator" standard consistent with the text of Rule 10b-5(b), which refers to "mak[ing] any untrue statement." 17 C.F.R. § 240.10b-5(b).

The government contends that "those who actually drafted the statements contained in [a written] document can naturally be described as their 'maker.'" U.S. Br. 15; *see also* Resp. Br. 28. But to "make [a] statement" is "to state" (*Webster's New International Dictionary* 1485 (2d ed. 1934)), not to draft statements for someone else. Just as the President rather than his speechwriters "makes" a speech, an unsigned editorial is "made" by the newspaper in which it is published, regardless of who drafted its content. *See* Chamber Br. 28-29. Similarly here, the Janus Funds "made" the statements in their own prospectuses regardless of whether those statements incorporated language that was originally drafted by a service provider.[1]

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[1] The term "make" appears not only in Rule 10b-5(b) but also in the Exchange Act itself: Section 18 covers those who "make or cause to be made" misleading statements. 15 U.S.C. § 78r(a). Redefining "make" per the "creator" standard would render the "cause to be made" clause superfluous. Although lead plaintiff disputes that "this [is] a case in which the defendant caused *another* person to make a misstatement" (Resp. Br. 29), the complaint alleges that JCM "caused" allegedly misleading "prospectuses to be issued for Janus mutual funds." Pet. App. 60a ¶ 6. Section 18 precisely fits lead plaintiff's theory of this case—except, of course, for its inability to plead actual reliance because it did not read the Janus Funds' prospectuses before investing in JCG stock. *See Heit* v. *Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

The government claims that, "[i]f an issuer can 'indirectly ... make' an untrue statement by using an analyst as a conduit, other persons can likewise indirectly make an untrue statement through an issuer." U.S. Br. 16. A telescope, however, doesn't work the same regardless of which end one looks through. In the "conduit" cases, the issuer remains the speaker even though it is using a third party to relay its statements to the public; the direct/indirect issue concerns only the number of steps between the issuer's mouth and the market's ears. *Cf.* 15 U.S.C. § 78t(b) (making it "unlawful ... to do any act or thing ... through or by means of any other person" that cannot be done directly). Similarly, the President remains the "maker" of his speech even if the audience reads about it in the newspaper. By contrast, when a third party drafts language that an issuer incorporates into its prospectus, it becomes the issuer's statement when it is subsequently communicated, directly or indirectly, from the issuer to the market.

Although lead plaintiff contends that the "creator" standard has been around for "a long period of time" (Resp. Br. 18), it is no coincidence that the SEC announced that standard in 1998—*after* this Court's decision in *Central Bank*. *See* U.S. Br. 13. Once this Court held that "those who provide services to participants in the securities business"—including "lawyer[s], accountant[s], [and] bank[ers]"—are "secondary actors" (*Central Bank*, 511 U.S. at 188, 191), the SEC tried to redefine "making" to reach those same secondary actors. *See SEC* v. *Tambone*, 597 F.3d 436, 446 (1st Cir. 2010) (en banc) ("the SEC, through the instrumentality of Rule 10b-5(b), seeks to impose primary liability on the defendants for conduct that constitutes, at most, aiding and abetting"). The

SEC's transparent effort to "create" a form of liability that Congress did not permit is inconsistent with this Court's recognition that any "decision to extend the cause of action" after the PSLRA is "for Congress." *Stoneridge*, 552 U.S. at 165.[2]

2. The SEC's redefinition of "make" is as sweeping as it is textually unsupported. In any securities offering, *dozens* of advisers—legal advisers, financial advisers, and others—may draft or revise portions of the registration statement. *See* ALAS Br. 5-6. The government's position, if accepted, would extend Rule 10b-5 "primary" liability to *all* of them—no matter how much (if any) control the adviser exercises over the issuer, how much (if at all) the misrepresentation concerns the adviser's own conduct, or how much (if at all) the adviser's role is disclosed to or otherwise known by the market.

Lead plaintiff attempts to limit the SEC's "creator" theory by claiming (incorrectly) that the statements at issue here "concern the defendant's own conduct." Resp. Br. 16. This purported limitation, which is found nowhere in Rule 10b-5 or in the SEC's own articulation of the "creator" standard, was invented by lead plaintiff for the sole purpose of narrowing the perceived (but not actual) impact of affirming the decision below. In fact, accepting the SEC's "creator" standard in this case would subject every adviser to a public company to potential Rule

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[2] For this reason, the SEC's "creator" standard is "plainly erroneous" and, therefore, not entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Moreover, it is inconsistent with Rule 10b-5 itself (*see ibid.*), and thus "[t]o defer to the [SEC]'s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000).

10b-5 liability for statements in the company's offering materials. Although lead plaintiff insists that this concern is "unfounded" (Resp. Br. 29 n.14), the government admits otherwise: "If an outside accountant or lawyer is sufficiently involved in creating or disseminating a statement issued in its client's name, that individual may be said to have 'made' the statement ... and may be subject to Rule 10b-5 liability on that basis." U.S. Br. 22. Accepting the SEC's "creator" standard would require all of those service providers to charge higher fees to offset this increased liability, which ultimately will raise costs to consumers. *See* Brunstad Br. 29-35.

The government protests that it is not seeking to expand secondary liability because, in its view, JCM's role as an investment adviser makes it "*essentially* a corporate insider" of the Janus Funds rather than a "true secondary acto[r]." U.S. Br. 17, 19 (emphasis added). Just as one cannot be "essentially" pregnant, JCM—a separate corporate entity—cannot be "essentially" a corporate insider of the Funds. *See Burks* v. *Lasker*, 441 U.S. 471, 483 (1979) (noting that Congress rejected "compulsory internalization of the management function"). In any event, the government acknowledges, in practically the same breath, that its test for liability would apply equally to those it concedes are secondary actors. U.S. Br. 22.[3]

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[3] Contrary to lead plaintiff's intimation (Resp. Br. 27), the only issues decided by this Court in *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983), were whether the Securities Act remedies are exclusive of a Section 10(b) claim, and (if not) what the burden of proof is for the Section 10(b) claim. *See id.* at 387, 390-91. *Huddleston* expressly declined to address

[Footnote continued on next page]

Both lead plaintiff and the government stress that JCM had certain "managerial" responsibilities with respect to the Funds. Resp. Br. 21; U.S. Br. 9. But those responsibilities—which, as the Fourth Circuit recognized, are "detailed" in the offering materials (Pet. App. 28a)—actually confirm that JCM did not make the challenged statements in the Janus Funds' prospectuses. Lead plaintiff never comes to grips with the express disclosure that *the Funds* are responsible for "preparing ... *the Funds*' prospectuses." J.A. 225a (emphasis added); *see also* Pet. Br. Add. 4a-5a. After all, Congress imposed the registration obligation on mutual funds; as "registrant[s]" they are not "nominal speaker[s]" (U.S. Br. 12) but *statutory* ones. 15 U.S.C. § 80a-8(b).

Even where the adviser handles "day-to-day" operations (Pet. App. 65a ¶ 18), the registration and offering of fund securities for sale is not operational—it is the fundamental obligation of the mutual fund as a legal entity and the central requirement (together with approval of the advisory contract) imposed by law on its Board of Trustees. 15 U.S.C. § 77f(a). The involvement of these independent actors means that the prospectuses did not "necessar[ily] or inevitabl[y]" include *anything* drafted by JCM. Resp. Br. 38 (quoting *Stoneridge*, 552 U.S. at 38)). Indeed, the Trustees, like the directors of any public company, are expressly made liable for the contents of the prospectuses under the Securities Act. 15 U.S.C. § 77k(a)(2). Any suggestion that they lacked the incentive to monitor the Funds' agents, including the investment adviser, is misdirected.

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whether Rule 10b-5 "permit[s] aider-and-abettor liability" (*id.* at 379 n.5), which *Central Bank* answered in the negative.

Like directors, certain "individual employees" have sometimes been held liable "for statements released in their companies' names." U.S. Br. 20. An issuing corporation can act only through its agents, and it is not inconsistent with the background structure of corporate law to hold individuals liable for actions they undertake on behalf (and in the name) of the corporation they serve as directors or officers. Indeed, Congress has expressly imposed liability on corporate officers who sign the registration statement. 15 U.S.C. § 77k(a)(1). Holding one corporation liable for the actions of a different corporation with separate ownership and independent governance, in contrast, *would* create unprecedented and unwarranted structural conflicts. *See, e.g., Burks*, 441 U.S. at 479-80.

3. Lead plaintiff and its *amici* also claim the "purposes" and "goals" of the Exchange Act support expanding the private right to sweep in suits against investment advisers and other service providers. Resp. Br. 51. Because "[p]olicy considerations cannot override ... the text and structure of the [Exchange] Act" (*Central Bank*, 511 U.S. at 188), these arguments are properly directed to Congress, not the Court. *See Stoneridge*, 552 U.S. at 165. That the proponents of expansion have thus far been unable to persuade the Legislature is no reason for this Court to take up the legislative mantle.

Moreover, the various policy arguments advanced in support of extending Rule 10b-5 are answered completely by the interlocking framework of the federal securities laws. *Cf. Central Bank*, 511 U.S. at 188. Neither Section 10(b) nor any other individual provision is a panacea for all allegations of wrongdoing in the business world. *See Santa Fe In-*

dus., Inc. v. Green, 430 U.S. 462, 478 (1977). Rather, Congress has developed over the past 75 years a multi-layered and nuanced approach to securities regulation and enforcement, of which Section 10(b) is only part. This reticulated regime includes both primary and secondary liability provisions to cover the range of conduct and actors that Congress has deemed appropriate.[4]

A private securities claimant bears the burden of identifying a cause of action authorized by Congress. If it cannot fit within one of the express private rights of action, then its ability to invoke the private right implied under Rule 10b-5 is limited to the scope of that right before 1995—when it was "ratified" by Congress in enacting the PSLRA. *Stoneridge*, 552 U.S. at 165. Lead plaintiff cannot find either an express private right or a pre-ratification implied private right; the Fourth Circuit's error was in stretching Rule 10b-5 rather than recognizing that the complaint was properly dismissed.

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The "maker" of statements in a prospectus is the company issuing the securities offered by that prospectus—on whom the statutory obligation to pre-

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[4] The SEC asserts that its ability to pursue those who provide "substantial assistance" might not be available on the particular facts of this case. U.S. Br. 23-25. Even if that were so, the securities laws provide a host of other liability provisions under which the SEC or private plaintiffs could proceed against investment advisers. In addition to Section 18 of the Exchange Act (*see* note 1, *supra*), the 1940 Acts include several liability provisions expressly applicable to investment advisers; indeed, the SEC proceeded against JCM on the underlying facts in this case without even trying to bring a "substantial assistance"—or, for that matter, Section 10(b)—claim.

pare and file the prospectus rests. *See* 15 U.S.C. § 80a-8(b). Any other actors, including the range of advisers that assist in preparing the prospectus, are secondary actors and therefore may be held liable *only* under a statutory provision that (unlike Section 10(b)) permits secondary liability. Because JCM did not "make" the statements in the Janus Funds' prospectuses, the Fourth Circuit's decision cannot stand.

II. LEAD PLAINTIFF DID NOT "RELY" ON THE STATEMENTS IN THE JANUS FUNDS' PROSPECTUSES

The *Basic* presumption *requires* a private securities-fraud plaintiff to plead and prove "that *the defendant* made *public* misrepresentations." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 n.27 (1988) (emphases added). Lead plaintiff and its *amici* do not deny this requirement; to the contrary, they simply ignore it. That is because it is fatal to the reliance theory accepted by the court below.

Even if JCM could be said to have "made" statements in the Janus Funds' prospectuses by "creat[ing]" them, as lead plaintiff (and the government) contend, JCM did *not* make those statements *to the public*. The public communication was entirely between the Janus Funds, as registrants of the securities offered by the prospectuses, and potential investors in those securities—a group that does *not* include lead plaintiff, which never purchased or sold any security offered by the prospectuses in which the challenged statements appear.[5]

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[5] Lead plaintiff thus fails the purchaser/seller requirement, which does not allow an investor to bring a private suit under Rule 10b-5 "without having either bought or sold the securities described in the allegedly misleading prospectus." *Blue Chip*

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A. The *Basic* Presumption Does Not Apply To Secondary Actors

This Court has never held the *Basic* presumption applicable to anything other than "*issuers*' disclosures." 485 U.S. at 246 n.23 (emphasis added). In particular, the Court has never held that *Basic* can be applied to presume that investors in the securities of one corporation relied on statements contained in the prospectuses offering the securities of *another company*, with separate ownership and independent governance. Neither lead plaintiff nor its *amici* identify any appellate case that has *ever* presumed reliance in that scenario, and certainly not before the PSLRA "froze" the law of private Rule 10b-5 actions in 1995. *Stoneridge*, 552 U.S. at 165-66. To the contrary, this Court held in *Stoneridge* that the *Basic* presumption did *not* apply to statements made (or created) by the non-issuer suppliers. *Id.* at 166-67.

Lead plaintiff tries to avoid this by arguing that "it makes no difference ... that the misstatements at issue were contained in prospectuses for the Janus Funds, rather than JCG's own prospectuses." Resp. Br. 35. That is wrong. JCG, while *an* issuer of secu-

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Stamps v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975). The suggestion that this issue is not properly before the Court (Resp. Br. 47 n.20) is inconsistent with *Stoneridge*, which recognized that the "emphasis on a purchase or sale of securities does provide some insight into the deceptive acts that concerned the enacting Congress." 552 U.S. at 160. Indeed, in a decision on which lead plaintiff and its *amici* are tellingly silent, this Court recently reiterated that only "*certain* purchases or sales" can give rise to a private action. *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2887 (2010) (emphasis added); *see also* SIFMA Br. 6-7.

rities, is not *the* issuer of the "securities *described in the allegedly misleading prospectus*" (*Blue Chip Stamps*, 421 U.S. at 727) (emphasis added)—the only securities that matter under *Basic*. The issuers of *those* securities were the Janus Funds, and it was the Janus Funds who spoke to the market in their own prospectuses.

Lead plaintiff insists, however, that JCM's "misstatements regarding market timing were publicly disclosed in the prospectuses," and therefore that this case is "fundamentally different" from *Stoneridge*." Resp. Br. 43, 45-46. That too is wrong. Charter's financial statements disclosed the substance of the suppliers' falsehoods—namely, that the "transactions were unrelated." 552 U.S. at 154. The only thing that was *not* disclosed was the identity of the parties on whose contracts the false financial statement rested—just as in this case the only thing that was not disclosed was the identity of the party allegedly assisting in creating the false statement.

Lead plaintiff also suggests that the reliance requirement was an afterthought or tangential consideration in this Court's prior decisions declining to extend the private right to secondary actors. Resp. Br. 44-47. Wrong again. This Court rejected aiding-and-abetting liability precisely *because* "the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions." *Central Bank*, 511 U.S. at 180; *see also Stoneridge*, 552 U.S. at 159, 166-67. Precisely the same problem presents itself here.

Because this Court has never applied the *Basic* presumption to a non-issuer—and no court of appeals had done so before the PSLRA was enacted—

the presumption is inapplicable in cases like this one. *See Stoneridge*, 552 U.S. at 165.

B. Reliance Cannot Be Presumed Without Direct Attribution

Lead plaintiff protests that the *Basic* presumption does not "depen[d] on the market knowing the true *identity* of the person making the public misstatement." Resp. Br. 48. Of course, this is a moot point if *Basic* is limited to statements by issuers; the market *always* knows the identity of the issuer because it is identified, by statute, on the face of the registration statement or other public filing. *See* 15 U.S.C. § 77aa(a)(1); *see also* J.A. 119a.

This Court's post-*Basic* reliance cases have emphasized that the plaintiff must prove reliance on "*the defendant's*" statements or acts, not statements or acts in the abstract. *Stoneridge*, 552 U.S. at 159; *Central Bank*, 511 U.S. at 180. If the market does not know who the speaker is, this requirement cannot be satisfied. For this reason, to the extent the *Basic* presumption applies at all to non-issuers, attribution is required. *See, e.g.*, *PIMCO*, 603 F.3d at 148 ("Absent attribution, plaintiffs cannot show that they relied on defendants' *own* false statements ...").

Lead plaintiff admits that, outside of the corporate insider context, the courts of appeals have regularly required direct attribution where the challenged statement was conveyed to the market by someone other than the named defendant. Resp. Br. 49; *see also, e.g.*, *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205-06 (11th Cir. 2001) (rejecting claim against law firm that allegedly played a "significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases"). As the Fifth Circuit recently explained, "[t]he attribution

requirement ... makes clear the boundary between primary violators—who are open to liability in private securities actions—and aiders and abettors, to whom the private right of action under section 10(b) does not extend." *Affco Invs. 2001 LLC* v. *Proskauer Rose, L.L.P.*, No. 09-20734, 2010 WL 4226685, at *9 & n.8 (5th Cir. Oct. 27, 2010) (expressing "concern" about "whether [the Fourth Circuit's decision below] comports with" this Court's cases).

Lead plaintiff calls the cases enforcing the attribution requirement "inapt because they all involved claims against 'secondary actors'—not issuers of the securities in which the plaintiff transacted." Resp. Br. 49. But JCM is a secondary actor with respect to the securities offered by the prospectuses containing the challenged statements; the fact that lead plaintiff did not transact in those securities makes its case weaker, not stronger. The fallacy in lead plaintiff's argument can be exposed by a simple example: Suppose a publicly traded accounting firm "created" a misstatement that was reproduced in the prospectus of one of its audit clients. In a suit by the equity investors of the accounting firm challenging the prospectus disclosure as false, the accountant is a "secondary actor" because it is not the issuer of the securities offered by the prospectus, even if it issued other securities in which the plaintiff transacted. The same is true here: JCM is a secondary actor with respect to the Janus Funds' securities even though its parent offered securities of its own—as to which there remain no allegations of misconduct. *See* Pet. Br. 22 n.3.

Lead plaintiff complains that the courts of appeals have not "explained why knowledge of an entity's true *identity* is necessary to rely on that en-

tity's *statement*." Resp. Br. 50-51. But they have. *See* Pet. Br. 51-52 (citing *PIMCO*, 603 F.3d at 156). As the Fifth Circuit recently reiterated, "[k]nowing the identity of the speaker is essential to show reliance because a word of assurance is only as good as its giver." *Affco*, 2010 WL 4226685, at *8.

In the district court, lead plaintiff "concede[d] ... that the prospectus statements were not specifically attributed to [petitioners]." Pet. App. 46a. In fact, the prospectuses were filed "[o]n behalf of" the Funds (J.A. 166a), recite "the Funds'" policy on excessive trading and refer to JCM in the third person (*id.* at 141a), and explain that the Funds are responsible for the "costs of preparing, printing and mailing the Funds' Prospectuses" (*id.* at 225a). *See also* Pet. Br. 25-26. No reasonable investor reading these documents could conclude that JCM was responsible for them; certainly nothing in them is directly attributed to JCM.

Abandoning the direct-attribution requirement, as lead plaintiff suggests, would require a fact-intensive inquiry into what "interested investors would have inferred" (Pet. App. 31a), or "what the investing public already knows" (Resp. Br. 54), in every case. Securities plaintiffs will argue that disputes regarding the "creator" of prospectus disclosures cannot be resolved on a motion to dismiss, thus subjecting secondary actors to expensive discovery and potentially forcing them to settle non-meritorious actions. ALAS Br. 16-22. The Court has repeatedly declined to so construe the securities laws. *Stoneridge*, 552 U.S. at 163-64; *see also Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1429 n.8 (2010).

Far from allowing secondary actors to "evade" liability (Resp. Br. 2), the direct-attribution requirement ensures that non-issuers are amenable to suit only where their involvement in the alleged statements was expressly disclosed to—and thus could be processed by—the market. "Specific attribution to a reputable source also induces reliance because of the ability to hold such a party responsible should things go awry." *Affco*, 2010 WL 4226685, at *8. It thus promotes the certainty and predictability that this Court has valued in construing the private right of action.

To the extent the *Basic* presumption is applicable at all in cases against non-issuers, the direct-attribution requirement is therefore an essential component.[6]

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[6] Although lead plaintiff suggests there is "more than one way" to prove reliance (Resp. Br. 41), *Stoneridge* held that there are only *two* presumptions available to private plaintiffs: *Basic* and *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128 (1972). The latter is unavailable to lead plaintiff because "JCM owed no duty to JCG shareholders" to correct statements in the Janus Funds' prospectuses. Pet. App. 52a-53a & n.7. *Basic* is thus the only presumption potentially available to lead plaintiff. Although one *amicus* suggests that this Court should create an *additional* presumption in cases against investment advisers because of their supposed "fiduciary duty to mutual fund shareholders" (CII Br. 20), the courts must "reject[t] ... new presumptions of reliance" after the PSLRA. *Malack* v. *BDO Seidman, LLP*, 617 F.3d 743, 754 (3d Cir. 2010). In any event, lead plaintiff is not a "mutual fund shareholde[r]" (CII Br. 20; *see also* U.S. Br. 31 n.14), and an investment adviser "owes fiduciary duties only to the fund"—*i.e.*, its client—"not to the fund's investors." *Goldstein* v. *SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006).

* * *

Enacting the PSLRA in 1995, "Congress accepted the [Section] 10(b) private cause of action as then defined but chose to extend it *no further*." *Stoneridge*, 552 U.S. at 166 (emphasis added). Lead plaintiff and the government cannot identify a single appellate decision that directly supports the judgment below on either "making" or "reliance," and certainly none that predates the PSLRA. *See* Pet. Br. 30. The undisputed novelty of this claim exposes it for what it is: yet another attempted end-run around *Central Bank* and *Stoneridge*. *See id.* at 41.

Reversal would restore the *status quo ante*, whereas affirmance would subject a new class of defendants to private liability. While meritorious private actions, when authorized by Congress, are unquestionably an important part of the securities-regulation regime, this Court has already held that *expansion* of the private right previously implied under Rule 10b-5 is, in this post-PSLRA world, a job "for Congress"—and for Congress alone. *Stoneridge*, 552 U.S. at 165. Fidelity to that holding does not allow the decision below to stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

At least five courts of appeals—including the Fourth Circuit below—have acknowledged a circuit split on the second question presented: Whether, in a private Rule 10b-5 action, a secondary actor can be held liable for statements made by another company and not directly attributed to the defendant at the time. Pet. App. 19a; *see also, e.g.*, *SEC* v. *Tambone*, 597 F.3d 436, 447 (1st Cir. 2010) (en banc); *SEC* v. *Wolfson*, 539 F.3d 1249, 1258–59 (10th Cir. 2008); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998).

Since the petition was filed, the Second Circuit compounded this split by expressly rejecting the Fourth Circuit's reasoning that attribution may be implied based on what "interested investors" allegedly would know. *Compare PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010), *with* Pet. App. 23a–24a. Indeed, Judge Parker, concurring in *PIMCO*, explained that the conflict warrants this Court's resolution "[i]n light of the importance of the existence, *vel non*, of an attribution requirement to the securities laws, the bar, and the securities industry." 603 F.3d at 162.

The Acting Solicitor General argues, however, that the Court need not resolve the conflict in *this* case because investment advisers purportedly have a closer relationship to their issuer clients than do other secondary actors, such as accountants, lawyers, and bankers. U.S. Br. 20–22 & n.10. In other words, the government guesses that the market is more likely to imply attribution for some secondary actors than for others. *Id.* at 20 (arguing that "investors

rely on the role of a mutual fund's investment adviser" (internal quotation omitted)). But the Second Circuit rejected implied attribution for *all* secondary actors—defined as "parties who are not employed by the issuing firm" (603 F.3d at 148 n.1)—including investment advisers. Thus, the government merely endorses the minority side of the conflict, which is hardly a reason for this Court to avoid resolving it.

The government's attempts at misdirection cannot obscure one simple fact: If this case had been brought in the Second Circuit, the dismissal would have been affirmed, whereas it was reversed by the Fourth Circuit. Investors, issuers, service providers, and courts are not well-served by such divergent application of federal law to participants in the national securities markets.

The petition for a writ of certiorari should be granted.

I. The Courts Of Appeals Are Divided On Both Questions Presented

It is telling that the government devotes less than five pages to discussing the real, and outcome-determinative, conflicts among the circuits on the two questions presented. *See* U.S. Br. 17–22. The government's efforts to wish away these conflicts fail.

A. The Circuits Are Divided On When A Non-Issuer "Makes" A Statement

Like lead plaintiff, the government denies that there is a circuit split on the "making" question because "[e]ach of the cases petitioners cite dealt with secondary actors that, unlike JCM, did not manage an issuer and had no role in preparing or disseminating the relevant misrepresentations." U.S. Br. 18. This is a distinction without a difference: The prohi-

bition on aiding-and-abetting liability announced in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), is just that—a prohibition on aiding-and-abetting liability. *See* Reply Br. 2–4.

Other courts of appeals have recognized that the *amount* of a secondary actor's participation in another's misstatement does not transform the secondary actor into a "maker" of that misstatement. *See* Pet. 10–14. To claim, as the government does, that some secondary actors are so involved with their clients as to be deemed primary violators is simply to say that aiding-and-abetting liability should be imposed in some circumstances. That the SEC disagrees with *Central Bank* and *Stoneridge* is no reason for this Court to refuse to police the line drawn in those decisions. Indeed, Congress itself recently declined to revisit the prohibition on private aiding-and-abetting liability. *See* Marcia Coyle, *Supreme Court Decisions Survive Senate Action on Financial Reform*, Nat'l L.J., May 21, 2010.

The need for this Court's review is even greater given the recent decisions in *PIMCO* and *Tambone*. In *PIMCO*, the Second Circuit easily brushed aside *In re Global Crossing, Ltd. Securities Litigation*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004), which was the *sole* "authority" cited by the Fourth Circuit below. Pet. App. 18a; *see also PIMCO*, 603 F.3d at 154. The Second Circuit likewise rejected the liability theory on which the government now attempts to salvage the Fourth Circuit's decision, holding that it could not "impose liability on secondary actors ... for their role in drafting and editing false documents on be-

half of an issuing firm" without a "radical departure from our precedents." *Id.* at 156.

Similarly in *Tambone*, the en banc First Circuit rejected the SEC's theory—recycled in the government's brief here (U.S. Br. 11)—that dissemination of a statement constitutes "making" that statement under Rule 10b-5. 597 F.3d at 442. The government in *Tambone* did not even pursue what has become its primary argument in this Court—namely, that the defendants could have "made" the relevant statement based on their "participat[ion] in the drafting process"—even though the SEC had raised that theory before the district court. *Id.* at 440–41. Both theories run smack into the unassailable observation that "[i]f *Central Bank*'s carefully drawn circumscription of the private right of action is not to be hollowed—and we do not think that it should be—courts must be vigilant to ensure that secondary violations are not shoehorned into the category reserved for primary violations." *Id.* at 446.

PIMCO and *Tambone* unambiguously rejected the SEC's arguments as attempts to "impose primary liability ... for conduct that constitutes, at most, aiding and abetting (a secondary violation)." 597 F.3d at 446. The government now attempts to portray the decision below as consistent with settled law, but it misrepresents what is settled as to the "making" question. While the government evidently agrees with the Fourth Circuit's decision below, that decision conflicts with *Central Bank*, *Stoneridge*, and the decisions of every other court of appeals to have addressed the issue.

B. The Circuits Are Divided On The Attribution Requirement

The government dismisses as a "purported split" (U.S. Br. 21 n.9) the open and acknowledged disagreement among the courts of appeals over whether direct attribution is a prerequisite to a finding of reliance in a private Rule 10b-5 action. Yet *every* recent case to address this issue—including the decision below—has recognized the circuit split. *See* Pet. App. 19a ("The courts of appeal have diverged over the degree of attribution required to plead reliance"); *see also, e.g.*, *Tambone*, 597 F.3d at 447 ("Two divergent strains of authority have evolved"). That split has only deepened with the Second Circuit's decision in *PIMCO*, as Judge Parker emphasized. *See* 603 F.3d at 161–62.

PIMCO addressed "whether ... a corporation's outside counsel can be liable for false statements that those attorneys allegedly create, but which are not attributed to the law firm or its attorneys at the time the statements were disseminated." 603 F.3d at 148. The Second Circuit held that "a secondary actor can be held liable in a private damages action brought pursuant to Rule 10b-5(b) only for false statements attributed to the secondary-actor defendant at the time of dissemination." *Ibid.* (footnote omitted). "Absent attribution," the court reasoned, "plaintiffs cannot show that they relied on defendants' *own* false statements, and participation in the creation of those statements amounts, at most, to aiding and abetting securities fraud." *Ibid.*

PIMCO emphatically rejected the Fourth Circuit's conclusion below that "a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly infer that interested

investors would have known that the defendant was responsible for the statement at the time it was made, *even if the statement on its face is not directly attributed to the defendant*." Pet. App. 23a–24a (emphasis added). Although the Fourth Circuit thought it sufficient that "interested investors would attribute to the defendant a substantial role in preparing or approving the allegedly misleading statement" (*id.* at 24a), the Second Circuit held otherwise:

> [S]econdary actors can be liable in a private action under Rule 10b-5 for only those statements that are explicitly attributed to them. The mere identification of a secondary actor as being involved in a transaction, *or the public's understanding that a secondary actor is at work behind the scenes*[,] are alone insufficient. To be cognizable, a plaintiff's claim against a secondary actor must be based on that actor's own articulated statement, or on statements made by another that have been *explicitly* adopted by the secondary actor.

603 F.3d at 155 (first emphasis added; internal quotations omitted).

Although *PIMCO* is squarely, and obviously, at odds with the decision below, the government asserts that "[t]here is ... no reason to conclude that the Second Circuit would apply an attribution requirement to a claim against an investment adviser." U.S. Br. 20. This speculation, however, is destroyed by the *PIMCO* decision itself, which noted that "[w]e use the term 'secondary actor' to refer to lawyers ... , accountants, *or other parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud*." 603 F.3d at 148 n.1 (emphasis added). This definition plainly includes investment

advisers, which are not—and indeed cannot be—"employed by" the funds they advise. *See* Part II, *infra*.

There is therefore no basis for distinguishing this case from *PIMCO*. In both cases, the allegedly false statements were contained in offering documents issued by a different company that did not employ the named defendants. *Compare* Pet. App. 17a–18a *with* 603 F.3d at 149–50. Yet the cases were decided differently solely because of the courts of appeals' conflicting views on the attribution requirement. The dismissal of the *PIMCO* complaint was affirmed *because* the alleged misstatements were not attributed to the law firm. *Id.* at 155. The dismissal of the complaint here, however, was reversed *even though* the statements were not attributed to the investment adviser. Pet. App. 17a (noting that "the individual fund prospectuses are unattributed on their face"). The two decisions cannot be reconciled.

In light of the clear and dispositive conflict among the courts of appeals on the attribution requirement, this Court's review is warranted.

II. An Investment Adviser Is No Less A Service Provider Than A Lawyer Or Accountant

On both questions presented, the government's efforts to dissuade this Court from resolving the circuit splits turn on a simple but fundamentally misguided distinction: The principal defendant here is an investment adviser, whereas the conflicting decisions involved attorneys, accountants, or banks. The government labels such service providers "outsiders," arguing that investment advisers by contrast are "essentially ... insiders." U.S. Br. 8–9. That distinction is every bit as nonsensical as it appears.

In a "prospectus liability" case—that is, where the Rule 10b-5 claim is premised on alleged misstatements in the prospectus, registration statement, or other offering documents—the universe of primary actors is limited to the issuer and its employees. All others involved in the offering, including the range of advisers—investment advisers, financial advisers, legal advisers, and so forth—are secondary actors. Thus, the lower courts have correctly (and unanimously) applied the prohibition on aiding-and-abetting liability to *all* persons and entities other than the issuer and its employees. *See PIMCO*, 603 F.3d at 148 n.1.

Unlike the government's current (and, before now, entirely unheard-of) argument, these appellate decisions are entirely consistent with this Court's precedents. In *Central Bank*, this Court rejected aiding-and-abetting liability for "those who provide services to participants in the securities business." 511 U.S. at 188. The Court reiterated in *Stoneridge* that this includes "[a]ll secondary actors." 552 U.S. at 166. In neither decision did the Court recognize an exception for investment advisers or any other class of service providers.

Unsurprisingly, the government is unable to cite a single case, from any court, holding that an investment adviser is analogous to a "corporate insider" of the mutual fund. The *sole* authority that the government musters is a footnote in a 33-year-old SEC administrative decision. U.S. Br. 9 (citing *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977)). Not only was this decision set aside on appeal (*see Steadman* v. *SEC*, 603 F.2d 1126, 1143 (5th Cir. 1979)), it is irrelevant: *Steadman* involved aiding-and-abetting liability, which *Central Bank* and

Stoneridge foreclose in the context of private Rule 10b-5 suits.

The issue in *Steadman* was whether an investment adviser "aided and abetted violations" of Section 17(a) of the Investment Company Act by causing several of the mutual funds it advised to buy and sell securities with a foreign fund to which it was also the adviser. 46 S.E.C. at 919–20. The SEC reasoned that the investment adviser's "controlling influence" over the foreign fund (*id.* at 920 n.81) was sufficient to render the foreign fund an "affiliated person of an affiliated person [*i.e.*, the adviser]" of the mutual funds. *Id.* at 920. *Steadman* is thus secondary liability squared: Not only did the SEC impose only aiding-and-abetting liability, it did so on the theory that the investment adviser controlled the fund it advised.

The nearest analogue in the private securities context is control-person liability under Section 20(a) of the Exchange Act. While it is certainly possible that, in an appropriate case, an investment adviser (or any other service provider) could exercise sufficient control over an issuer to be liable as a control person, in *this* case lead plaintiff has never pleaded that JCM or JCG are control persons *of the Janus Funds*. *See* Pet. App. 115a–116a; *see also* C.A. Reply Br. 22 n.10 (conceding that "replead[ing]" would be required "to add section 20(a) 'Control Person' claims against JCG and JCM for their role in controlling the activities of the funds"). The government has no license to rewrite the operative pleadings to fit its liability theory *du jour*.

It is no answer to say (as the government does) that some investment advisers are intimately involved in their clients' businesses. The same can be

said for many lawyers, bankers, and consultants. These service providers remain, however, service providers: In each case, the defendant is not the issuing company or an employee of the issuing company but rather a separate company that is connected only by contract to the issuer. The "closeness" of the relationship (*i.e.*, the extent of services contracted out to the service provider) is irrelevant to the Rule 10b-5 analysis.*

It is bizarre that the government would claim that investment advisers to mutual funds are "essentially ... corporate insider[s]" under the securities laws (U.S. Br. 9) without ever acknowledging that Congress has passed two statutes dealing with the securities-law aspects of this particular industry. The Investment Company Act of 1940 and the Investment Advisers Act of 1940 together include 89 sections and comprise almost 100 pages of the United States Code. *See* 15 U.S.C. §§ 80a-1 *et seq.*, 80b-1 *et seq.* The 1940 Acts contain liability provisions specifically tailored to investment advisers (*id.* §§ 80a-35(a), 80b-6), rendering it unnecessary to distort primary liability under Section 10(b) to reach them. Moreover, *nothing* in the 1940 Acts, which comprehensively regulate the fund-adviser relation-

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* This is true both in general and in this particular case. While the Janus Funds have delegated certain management functions to JCM, those functions do *not* include preparation or filing of the prospectus and other offering documents—for which the Funds expressly remain responsible. *See* C.A. J.A. 366; *see also, e.g.*, 15 U.S.C. § 80a-24(a). JCM is thus indisputably a secondary actor with respect to the activity challenged in this lawsuit (prospectus disclosure) regardless of the extent of its involvement in *other* aspects of the Funds' operations.

ship, makes the investment adviser a "corporate insider" of the mutual funds it advises.

The government's blatant disregard for the corporate form is impermissible. *See United States* v. *Bestfoods*, 524 U.S. 51, 63–64 (1998). The investment adviser and the funds must by law be separate legal entities, with separate boards of directors, and the 1940 Acts contain numerous provisions to ensure that they remain independent. *See, e.g.*, 15 U.S.C. § 80a-10(a) (limiting the percentage of the fund's board that can be affiliated with the investment adviser). The relationship between these separate companies is not that of employer and employee, but rather is governed by a written contract that must, by law, be approved by the independent directors of the funds and their shareholders. *Id.* § 80a-15(a). This Court has therefore emphasized the statutorily required *independence* between funds and their adviser. *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422–23 (2010). Independence is the antithesis of "insiderness."

* * *

This Court has enforced the prohibition against secondary liability in private Rule 10b-5 actions to reduce the uncertainty faced by non-issuer participants in our securities markets. *Central Bank*, 511 U.S. at 189–90. That approach requires a bright line between primary actors (issuers and their employees) and secondary actors (everyone else, including all contractual service providers). The government's naked effort to blur that line with respect to one type of service provider—investment advisers—has no basis in any statutory or decisional authority, and is misguided as a matter of federal policy. The government cannot paper over clear conflicts among the

courts of appeals by inventing a flimsy distinction that was not litigated by the parties or addressed by the lower courts.

The government thinks the decision below was "correc[t]." U.S. Br. 8. That is decidedly a minority view, but one the government is free to advance on the merits. Given the manifest, and manifold, circuit splits exacerbated by the Fourth Circuit's decision, however, the government has offered no reason to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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QUESTIONS PRESENTED

1. Whether an investment adviser to mutual funds "ma[d]e" misleading statements for purposes of liability under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, by participating in the drafting and dissemination of misleading prospectuses of mutual funds it managed.

2. Whether misleading statements in a mutual fund's prospectuses must be explicitly attributed to the mutual fund's investment adviser in order to establish the reliance element of a private Section 10(b) action against the adviser.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal securities laws. This case involves one of those laws, Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act or Act), 15 U.S.C. 78j(b), and its implied private right of action. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. This case is a private action filed pursuant to Section 10(b) of the Exchange Act, and SEC Rule 10b-5, 17 C.F.R. 240.10b-5. Under Section 10(b), it is

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * * * *
>
> [t]o use or employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. 78j(b).

Pursuant to Section 10(b), the Commission has promulgated Rule 10b-5, which makes it

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5.

The United States is authorized to bring criminal actions to punish violations of Section 10(b), see 15 U.S.C. 78ff, and the Commission is authorized to bring civil enforcement actions to prevent and penalize violations of that provision, see 15 U.S.C. 78u(d)(1) (suits for injunctive relief); 15 U.S.C. 78u(d)(3)(A) (suits for civil penalties). This Court has also inferred the existence of a private right of action to enforce Section 10(b) from "the words of the statute and its implementing regulation." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). When Congress enacted the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, it "accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166.

The Court has described the elements of a Section 10(b) private action as follows:

> In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Stoneridge, 552 U.S. at 157 (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005)). With respect to the reliance element, this Court has held that a rebuttable presumption of reliance can be supported by the fraud-on-the-market theory, under which the market price of a stock reflects "most publicly available information," including "any public material misrepresentations." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242, 247 (1988); see *Stoneridge*, 552 U.S. at 159.

2. This case involves alleged misrepresentations and omissions in prospectuses issued by several mutual funds. As this Court recently reiterated, mutual funds differ significantly from typical operating companies. *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010). The Court in *Jones* explained that a "mutual fund is a pool of assets, consisting primarily of [a] portfolio [of] securities, and belonging to the individual investors holding shares in the fund." *Ibid.* (quoting *Burks* v. *Lasker*, 441 U.S. 471, 480 (1979)). It noted that "[a] separate entity called an investment adviser [typically] creates the mutual fund, which may have no employees of its own." *Ibid.* (citations omitted). "The adviser selects the fund's directors, manages the fund's investments, and provides other services." *Ibid.* (citing *Burks*, 441 U.S. at 481). "Because of the relationship between a mutual fund and its investment adviser, the fund often '"cannot, as a practical matter sever its relationship with the adviser."'" *Ibid.* (quoting *Burks*, 441 U.S. at 481, in turn quoting S. Rep. No. 184, 91st Cong., 1st Sess. 5 (1969)).

3. Petitioner Janus Capital Group Inc. (JCG) is a publicly traded asset-management firm that sponsors a family of mutual funds known as the Janus Funds. Petitioner Janus Capital Management LLC (JCM), a wholly-owned subsidiary of JCG, is the investment adviser to the Janus Funds. Pet. ii; Pet. App. 59a.

Respondent, the lead plaintiff in this putative class action, alleges that JCG and JCM violated Section 10(b) and Rule 10b-5 by making false statements about the manner in which the Janus Funds would be operated. More specifically, respondent alleges that the prospectuses of several of the Janus Funds "created the misleading impression that [JCG and JCM] would imple-

ment measures to curb market timing in the Janus Funds," when in fact "secret arrangements with several hedge funds" permitted "market timing transactions," to the alleged detriment of long-term investors in the Funds.[1] Pet. App. 60a-61a. The suit is brought on behalf of shareholders of JCG. *Id.* at 59a. The complaint alleges that class members purchased shares of JCG's stock at inflated prices between 2000 and the public revelation in 2003 of the market-timing arrangements, after which many investors withdrew from the Janus Funds and the price of JCG's stock fell dramatically. *Id.* at 59a, 61a-63a.

The operative complaint alleges that JCM, in its capacity as investment adviser to the Janus Funds, is "responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds."[2] Pet. App. 65a. Thus, although "each mutual fund is in fact its own company," the complaint alleges that "as a practical matter the management company runs [each fund]." *Id.* at 71a. The complaint alleges that prospectuses for several of the Janus Funds stated that the Funds were not intended for market timing and that measures had been put in place to deter such activities. *Id.* at 72a-80a. The complaint alleges that the "policy

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[1] The term "market timing" refers to "the practice of rapidly trading in and out of a mutual fund to take advantage of inefficiencies in the way the fund values its shares." Pet. App. 5a-6a. "Market timing has the potential to harm other fund investors by diluting the value of shares, increasing transaction costs, reducing investment opportunities for the fund, and producing negative tax consequences." *Id.* at 6a-7a.

[2] Because the case comes to this Court on an appeal from the district court's order granting petitioner's motion to dismiss, the complaint's factual allegations must be taken as true. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

against market timers" common to all of those Funds was written and represented by "Janus" (referring collectively to JCG and JCM). *Id.* at 59a, 69a. The complaint also alleges that JCM disseminated the Funds' prospectuses to potential investors, and that JCG made prospectuses available on its website. *Id.* at 71a-72a.

4. The district court granted petitioners' motion to dismiss the complaint. Pet. App. 42a-53a. With respect to petitioner JCG, the court concluded that the complaint contained no allegations that JCG "actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it." *Id.* at 46a. With respect to petitioner JCM, the court did not determine "whether JCM made the alleged misstatements," *id.* at 50a n.5, because it held that a mutual fund's investment adviser owes no duty to shareholders of its parent company when they have not purchased shares of the mutual fund, *id.* at 49a-53a.

5. The court of appeals reversed. Pet. App. 1a-41a. As relevant here, the court held that respondent had adequately alleged that (a) petitioners had "made" the allegedly misleading statements, and (b) the statements at issue were properly "attributable" to petitioner JCM.

a. Recognizing that "a plaintiff must plead with particularity" under Rule 9(b) of the Federal Rules of Civil Procedure, Pet. App. 17a, the court of appeals summarized respondent's allegations as follows:

> Specifically, the complaint alleges that [petitioners] "wrote and represented [their] policy against market timers," and "publicly issued false and misleading statements." The complaint also alleges that [petitioners] "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored invest-

> ment vehicles for retirement plans." According to the complaint, [petitioners] made these representations by "caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public," through filings with the SEC and dissemination on a joint Janus website.

Id. at 17a-18a (some brackets in original; quoting passages now reprinted at Pet. App. 69a, 109a, 60a, and 60a, respectively). The court concluded that those "statements, taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a.

b. The court of appeals observed that the plaintiff in a private Section 10(b) suit "must allege that it relied on the defendant's false or misleading statement." Pet. App. 15a. Recognizing that this case "arises in the limited context of fraud-on-the-market," the court of appeals declined to "establish an attribution standard for all reliance inquiries." *Id.* at 23a. For purposes of "fraud-on-the-market reliance," however, it held that "the public attribution element of the reliance inquiry" could be established by proving "that interested investors * * * would attribute the allegedly misleading statement to the defendant." *Id.* at 23a, 24a.

The court of appeals concluded that respondent's allegations satisfied that requirement. Pet. App. 27a-31a. The court emphasized respondent's allegations that JCM, as the investment adviser to the Janus Funds, is responsible for "day-to-day management" and, "as a practical matter," runs each of the funds. *Id.* at 27a. The court noted that "JCM is listed as investment adviser to the funds in the prospectuses and the state-

ments of additional information for each of the Janus funds, and its duties are detailed in these documents." *Id.* at 28a. Under these circumstances, the court "conclude[d], at the Rule 12(b)(6) stage, that * * * interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses, particularly the content pertaining to the funds' policies affecting the purchase or sale of shares." *Id.* at 31a.[3]

SUMMARY OF ARGUMENT

I. A. Rule 10b-5(b) makes it unlawful for "any person, directly or indirectly" to "make any untrue statement of a material fact * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5. The Commission has construed the term "make" as providing for primary liability when a person "creates" a misrepresentation either by writing or speaking it, providing false or misleading information for another to put into it, or allowing it to be attributed to him. Under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), the Commission's construction of its own rule is entitled to controlling weight.

Consistent with the ordinary meaning of the term "make," someone who creates or writes statements contained in a written document can be described as the "maker" of those statements. That description is espe-

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[3] The court of appeals also held that the allegations against JCM's parent company, JCG, were insufficient to state a claim of primary liability under Section 10(b), but that respondent had adequately pleaded a claim of control-person liability against JCG under Section 20(a) of the Exchange Act, 15 U.S.C. 78t(a). Pet. App. 32a-40a. Petitioners do not challenge that aspect of the court of appeals' decision, except to the extent it assumes there is a valid Section 10(b) claim against JCM. Pet. Br. 7 n.2.

cially appropriate in the context of Rule 10b-5, because it (like Section 10(b)) applies to those who act "directly or indirectly." Petitioners concede (Pet. Br. 38 n.7) that an issuer can speak "indirectly" by using an analyst as a conduit to the market. It follows that someone else can make a statement indirectly by creating it and having it appear in a prospectus formally issued in the name of another entity.

B. Under the Commission's reading of Rule 10b-5, JCM "wrote and represented," and therefore "made," misleading statements in the Funds' prospectuses. But even if the word "make" is given a more limited meaning of "communicate," respondent has adequately alleged a claim of primary liability.

1. Petitioners contend that a mutual fund's investment adviser should be considered a "secondary actor" that cannot be held liable for statements in a prospectus. But the allegation that JCM exercised day-to-day management over the Funds' business activities is plausible because it is consistent with mutual-fund-industry practice. An investment adviser's managerial role makes it essentially a corporate insider, and distinguishes it from a true secondary actor like an accountant, lawyer, or bank.

Petitioners do not argue that individual officers and employees are categorically immune from Rule 10b-5 liability for misrepresentations that they cause to be disseminated in their employers' names. There is thus no "bright-line distinction between issuers and non-issuers" (Pet. Br. 20) for purposes of Section 10(b) liability. If an individual can be held liable for playing a sufficient practical role in the drafting and dissemination of statements issued in his employer's name, the same rule

should apply to an entity (like JCM) that is allegedly responsible for the Funds' day-to-day management.

2. Section 10(b)'s private right of action "does not extend to aiders and abettors," but it "continues to cover secondary actors who commit primary violations." *Stoneridge Inv. Partners, LLC* v. *Scientific Atlanta, Inc.*, 552 U.S. 148, 158, 166 (2008). Even if JCM is considered a "secondary actor," respondent's allegations adequately advance a claim of primary liability, based on JCM's *own* misrepresentations, and not a secondary-liability claim that JCM merely aided a fraud spearheaded by the Funds.

The Court need not decide when an outside accountant or lawyer may be subject to Rule 10b-5 liability based on its involvement in creating or disseminating a statement in a client's name. Although JCM was subject to oversight by the Funds' trustees, it allegedly performed the "insider" functions that corporate officers and employees ordinarily would, rather than the advisory role typically associated with outside service providers. Thus, JCM can be held liable for its own statements to the market, made "directly or indirectly" through the prospectuses of the Funds over which it exercised managerial control.

3. Petitioners suggest that a categorical limitation on Section 10(b) liability for secondary actors is consistent with the statute authorizing the Commission (but not a private party) to bring an action against someone who substantially assists another person's violation of the Exchange Act. See 15 U.S.C. 78t(e). But such an action requires the Commission to prove that there was an underlying primary violation. Here, if the Funds' trustees were (as seems likely) unaware of the misleading nature of JCM's conduct, the Funds likely lacked

scienter, which would mean that there was no underlying fraud for the investment adviser to aid and abet.

II. A. Petitioners contend that, even if JCM "made" untrue statements, respondent cannot satisfy the reliance element of a Section 10(b) private action because those statements were not expressly attributed to JCM at the time. But one may rely upon a statement without knowing who made it (or while having a false impression about who made it). To establish reliance through the fraud-on-the-market presumption, a plaintiff must show that a misrepresentation was material and communicated to the public, but it need not show that the defendant was *known* to have made the statement at the time. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 246-247 (1988). Petitioners' attribution requirement would have the perverse effect of insulating a defendant from suit precisely because it was successful in concealing its identity as the maker of false statements.

Stoneridge does not suggest that attribution is a prerequisite for the fraud-on-the-market presumption. In *Stoneridge*, the defendants had no role in the drafting or publication of allegedly misleading financial statements, but had simply engaged in potentially "deceptive conduct" that was unknown to the public. 552 U.S. at 159, 161. Here, respondent alleges that JCM used its managerial control over the Funds to make false statements that were publicly disclosed.

B. Even if the reliance element of a Section 10(b) private action required contemporaneous public identification of the person who "made" a statement, *express* attribution should not be required when the statement's actual maker is so closely tied to the entity in whose name the statement is made that reasonable investors would have inferred the actual maker's responsibility.

In light of the close relationship between investment advisers and their mutual funds, investors would naturally infer that statements in a fund's prospectus bear the imprimatur of the fund's adviser.

ARGUMENT

As the court of appeals correctly held, respondent's complaint adequately alleges both that JCM made material, untrue statements, and that respondent and other members of the putative class relied to their detriment on those statements. Although petitioners characterize JCM as a mere "service provider" to the Janus Funds, respondent alleges that JCM was responsible for the Funds' day-to-day management, and that allegation is consistent with standard practice in the mutual-fund industry. Under those circumstances, an investment adviser can properly be said to have "made" statements issued in the names of the funds it manages. And, contrary to petitioners' contention, nothing in this Court's precedents suggests that either the reliance element of a Section 10(b) private suit, or the presumption of reliance that applies when material misstatements are communicated to the public, depends on the express attribution of those misstatements to the defendant.

I. RESPONDENT'S COMPLAINT ADEQUATELY ALLEGES THAT THE INVESTMENT ADVISER "MADE" STATEMENTS THAT APPEARED IN THE PROSPECTUSES OF THE MUTUAL FUNDS IT MANAGED

A. Rule 10b-5 Encompasses Untrue Statements That Are Created By Someone Other Than The Nominal Speaker

Rule 10b-5(b) makes it unlawful for "any person, directly or indirectly" to "make any untrue statement of a material fact * * * in connection with the purchase or

sale of any security." 17 C.F.R. 240.10b-5. Since 1998, the SEC, which promulgated the rule, has understood it to impose primary liability "when a person, acting alone or with others, *creates* a misrepresentation * * * —assuming, of course, that he or she acts with the requisite scienter." SEC Amicus Br. at 17, *Klein* v. *Boyd*, Nos. 97-1143 & 97-1261 (3d Cir. filed Apr. 1998), http://www.sec.gov/pdf/klein.pdf.[4] In 2005, the Commission adopted that interpretation of Rule 10b-5(b) in the context of a formal adjudication. See *In re Robert W. Armstrong, III*, Rel. No. 34-51920, 2005 WL 1498425, *7 (June 24, 2005) ("A person can be primarily liable under Section 10(b) and Rule 10b-5 for directly or indirectly making an untrue statement of fact if that person, acting alone or with others, creates a false statement that reaches investors."). In an amicus brief filed in 2009, the Commission again reiterated its view that "a person makes a false or misleading statement and thus can be liable as a primary violator of Rule 10b-5 when that person *creates* the statement," which occurs when "the statement is written or spoken by him, or if he provides the false or misleading information that another person then puts into the statement, or if he allows the statement to be attributed to him." SEC Amicus Br. at 7, *Pacific Inv. Mgmt. Co. LLC (PIMCO)* v. *Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010) (No. 09-1619-cv) (SEC *PIMCO* Br.).

1. The Commission's interpretation of the term "make" in Rule 10b-5—having been adopted in the agency's briefs and in a formal adjudication—is "con-

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[4] The Commission's amicus brief in *Klein* was filed after the Third Circuit vacated a panel decision and granted rehearing en banc, see *Klein* v. *Boyd*, Nos. 97-1143 and 97-1261, 1998 WL 55245 (Mar. 9, 1998). The parties settled the case before the en banc court issued a decision.

trolling" as long as it is not "plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citations and internal quotation marks omitted); accord *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 397 (2008) (deferring to the interpretation of an EEOC regulation advanced in an amicus brief); cf. *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002) (according *Chevron* deference to an SEC interpretation of the "text of § 10(b)" adopted in a "formal adjudication").

2. For purposes of the question presented here, the most salient feature of the Commission's interpretation is the conclusion that one can "make" a statement by "creat[ing]" or "writ[ing]" it, even if the statement's creator is not expressly identified. That conclusion is fully consistent with the ordinary meaning of the term "make." See, *e.g.*, 1 *Shorter Oxford English Dictionary* 1682 (6th ed. 2007) (def. I.1.c, transitive verb: "Compose, write as the author (a book, a poem, verses, etc. * * *); draw up (a legal document, esp. one's will)"; def. I.2, transitive verb: "Cause the material or physical existence of; produce by action, bring about * * * ; create or take part in the creation of (a sound recording, film, etc.)"); *Webster's New International Dictionary* 1485 (2d ed. 1958) (def. III.17: "To cause to exist, appear, or occur"); see also *SEC* v. *Tambone*, 597 F.3d 436, 443 (1st Cir. 2010) (en banc) (referring to "several common and representative dictionary definitions of 'make,' which include 'create [or] cause'; 'compose'; and 'cause (something) to exist'") (citations omitted).[5]

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[5] Petitioners cite (Br. 37) *Tambone* as rejecting the SEC's construction of "make." The court in *Tambone* made clear, however, that allegations like the ones here would be covered by its view of the term's ordinary meaning. The court rejected only the proposition that "one can 'make' a statement * * * created entirely by others." 597 F.3d at 443.

Petitioners acknowledge (Br. 40) that "'make' can sometimes mean 'create.'" They suggest, however, that the word will not bear that meaning in the context of the phrase "make any untrue statement," because, they say (Br. 41), "when the President delivers a speech, we say that he *made* the speech—but it would stretch ordinary usage too far to say that the President's *speechwriters* made the speech." That analogy is doubly flawed. Whereas the phrase "make a speech" generally refers to oral delivery by a single person at a discrete point in time, the Funds' prospectuses were written documents disseminated through a variety of methods. The prospectuses, moreover, were issued in the names of artificial persons (the Janus Funds) who by definition can act only through (and at the direction of) others. In the context of such a written document, those who actually drafted the statements contained in the document can naturally be described as their "maker."

3. Reading the word "make" to apply to the acts of someone who "creates" an untrue statement that is then transmitted to the market by another person or entity is especially appropriate in the context of Rule 10b-5(b). Both the statute and the rule encompass "any person" who engages "directly *or indirectly*" in the proscribed conduct. 15 U.S.C. 78j(b) (emphasis added); 17 C.F.R. 240.10b-5 (emphasis added). Petitioners' reading—under which "the issuer is the only one covered by Section 10(b)" in a case involving a prospectus (Br. 37-38)—would deprive the word "indirectly" of practical effect, by preventing an issuer from serving as a conduit for another's statements.[6]

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[6] Petitioners half-heartedly suggest (Br. 38 n.7) that the phrase "directly or indirectly" applies only to "the jurisdictional nexus" in the

Indeed, petitioners acknowledge that an issuer "may speak to the market * * * indirectly * * * by providing information to analysts 'with the intent that the analysts communicate those statements to the market.'" Pet. Br. 38 n.7 (quoting *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002)); see also, *e.g.*, *Novak* v. *Kasaks*, 216 F.3d 300, 314-315 (2d Cir. 2000); *Cooper* v. *Pickett*, 137 F.3d 616, 624 (9th Cir. 1997). That sensible concession, however, fatally undercuts petitioners' contention that Section 10(b) applies in a more limited fashion to "prospectus-liability case[s]." Pet. Br. 15, 37. If an issuer can "indirectly * * * make" an untrue statement by using an analyst as a conduit, other persons can likewise indirectly make an untrue statement through an issuer.[7] The SEC's construction of Rule 10b-5(b) as reaching such indirect statements—even when they appear in a prospectus formally issued in the

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statute and rule. In both provisions, however, "directly" and "indirectly" are adverbs that modify the verbs that follow the intervening jurisdictional nexus, which is a self-contained prepositional phrase. Thus, in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court read the phrase "directly or indirectly" to modify the substantive activities Section 10(b) proscribes, rather than the jurisdictional nexus. *Id.* at 176 (rejecting aiding-and-abetting liability in part because it would "extend[] beyond" the statute's reference to those "who engage, even indirectly, in a proscribed activity").

[7] For the same reasons, there is no tension between the Commission's construction of the rule and the text of Section 10(b). While petitioners claim that the issuer is "the only one" using or employing anything in a prospectus, Br. 37, the statute applies to those who use "any manipulative or deceptive device or contrivance" "directly or *indirectly*." The phrase "directly or indirectly" also distinguishes Section 10(b) from Section 18(a) of the Exchange Act. As petitioners note (Br. 38-39), Section 18(a) refers to persons who "shall make or cause to be made" certain statements, 15 U.S.C. 78r(a), but it does not use the phrase "directly or indirectly."

name of an entity other than their creator—is not "plainly erroneous or inconsistent with the regulation," and it is therefore entitled to deference from this Court. *Holowecki*, 552 U.S. at 397 (quotation marks omitted).

B. Respondent's Allegations Adequately State A Claim Of Primary, Not Secondary, Liability Under Section 10(b)

1. As an investment adviser exercising day-to-day management over a mutual fund, JCM should not be considered a "secondary actor"

For the foregoing reasons, JCM's alleged role in the drafting of the Janus Funds' prospectuses is a sufficient basis for concluding that JCM "made" the alleged misstatements contained therein. But even if the word "make" in Rule 10b-5(b) is given the more limited meaning of "communicate," the complaint adequately alleges that JCM engaged in that proscribed conduct.

a. Respondent alleges that JCM, in its role as the investment adviser to the Janus Funds, "is responsible for the day-to-day management of * * * [the] business affairs of the funds." Pet. App. 65a. Respondent further alleges that, "[w]hile each mutual fund is in fact its own company, as a practical matter the management company runs [each fund]." *Id.* at 71a.

Those allegations are eminently plausible in light of mutual-fund-industry practice. Unlike a typical secondary actor such as "a lawyer, accountant, or bank," *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994), an investment adviser's unique and close relationship with a mutual fund makes it essentially a corporate insider. As the Commission has explained: "[T]he term 'investment adviser' is to some extent a misnomer" because "[t]he so-called 'adviser' is no mere consultant. He is the fund's

manager. Hence the investment adviser almost always controls the fund." *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977) (*Steadman*) (citations omitted), vacated and remanded on other grounds by *Steadman* v. *SEC*, 603 F.2d 1126 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981); see *Short Selling in Connection With a Public Offering*, 72 Fed. Reg. 45,100 n.71 (2007) (quoting *Steadman*). See also *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010) (it is "typical" for an investment adviser to "create[] the mutual fund," "select[] the fund's directors, manage[] the fund's investments, and provide[] other services"); Resp. Br. 21, 39-40.

In disputing the insider status of advisers like JCM, petitioners argue (Br. 22) that "[t]his Court has heretofore emphasized the statutorily required *independence* between funds and their adviser." But the relevant statutory provisions simply ensure that a fund's board of directors can "supply an independent check on [the investment adviser's] management." *Burks* v. *Lasker*, 441 U.S. 471, 484 (1979) (quoting S. Rep. No. 184, 91st Cong., 1st Sess. 32 (1969)). The board's oversight role does not change the fact that the adviser continues to provide the management.[8]

b. The Court has explained that, so long as "the requirements for primary liability under Rule 10b-5 are

[8] Moreover, Congress specifically declared that, with exceptions inapplicable here, "the rights and remedies provided by [the Exchange Act]"—including Section 10(b)—"shall be in addition to any and all other rights and remedies that may exist at law or in equity," 15 U.S.C. 78bb(a), and that "nothing in [the Investment Company Act of 1940] shall affect" the "liabilities of any person under [the Exchange Act and other securities laws]," 15 U.S.C. 80a-49. Cf. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983) (noting that "§ 10(b) is a 'catchall' antifraud provision" that may apply even when a more specific provision of the securities laws does not) (citation omitted).

met," *any* "person or entity" who "makes a material misstatement * * * on which a purchaser or seller of securities relies may be liable as a primary violator." *Central Bank*, 511 U.S. at 191. Petitioners argue at length (Br. 15-29) that JCM should be regarded as a run-of-the-mill outside service provider to the Funds. Whatever the merits of creating categorical restrictions on primary liability for true secondary actors—such as an accountant, lawyer, or bank (to use the list in *Central Bank*, 511 U.S. at 191)—such restrictions should not apply to those who are actually responsible for an issuer's statements. Thus, they should not apply to an investment adviser like JCM, given respondent's plausible allegations that JCM is "responsible for the [issuer's] day-to-day management," and "as a practical matter * * * runs [the issuer]." Pet. App. 65a, 71a.

Petitioners contend that, in a case involving statements in a prospectus, "the universe of primary actors is limited to the issuer *and certain of its employees*." Pet. Br. 15 (emphasis added); see *id.* at 19, 22. Petitioners never say which employees might be held liable—perhaps because, in light of the functions typically performed by investment advisers, a mutual fund "may have no employees of its own." *Jones*, 130 S. Ct. at 1422. Nevertheless, courts of appeals have repeatedly (and correctly) recognized that individual employees or officers can be liable under Section 10(b) for "mak[ing]" statements that are issued in the name of a company rather than in the names of the individuals themselves.[9]

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[9] For example, the Seventh Circuit held in *McConville* v. *SEC*, 465 F.3d 780 (2006), cert. denied, 552 U.S. 811 (2007), that a corporate official who had "substantial involvement in drafting the financial statements" in the company's SEC filing could be primarily liable under Section 10(b), even though "she did not sign or physically file the [docu-

Petitioners understandably decline to argue that individual officers and employees are categorically immune from Rule 10b-5 liability for false or misleading statements that they cause to be disseminated in their employers' names. Petitioners' recognition that such individuals can be liable under Rule 10b-5, however, cannot be reconciled with a "bright-line distinction between issuers and non-issuers" (Br. 20), or with the contention (*ibid.*) that JCM cannot be held liable regardless of "the nature and extent of [its] duties." The justification for imposing Rule 10b-5 liability on individual employees for statements released in their companies' names is not that the employees are themselves "issuers" of securities. No less than JCM and the Funds it manages, an individual sued in his personal capacity and the company that employs him are distinct legal entities. Rather,

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ment]." *Id.* at 786-787. The court rejected the official's argument that her "participation in creating the corporate misstatements cannot form the basis for Rule 10b-5 liability." *Id.* at 786. The issue, the court concluded, was whether she "caused [the company] to make material misstatements to the investing public." *Id.* at 787. The Second Circuit held in *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, cert. denied, 534 U.S. 1071 (2001), that a corporate official could be primarily liable for the corporation's false statements, over his objection that the misrepresentations were not "attributable to him," because he "was involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements issued by" the corporation. *Id.* at 75-76. And the Tenth Circuit held in *SEC* v. *Wolfson*, 539 F.3d 1249 (2008), that a non-employee consultant could be primarily liable under Section 10(b) for misstatements in SEC filings that he prepared, even though the filings "were issued in [the company's] name" and he "did not sign, certify, or physically file [them]." *Id.* at 1261. The court explained that "[t]he relevant question is only whether [the defendant] can fairly be said to have *caused* [the company] to make the relevant statements, and whether he knew or should have known that the statements would reach investors." *Ibid.*

courts have recognized (see note 9, *supra*) that an employee who plays a sufficient practical role in the drafting and dissemination of statements issued in the company's name can thereby "make" the statements ("directly or indirectly") within the meaning of Rule 10b-5(b). Given respondent's allegation that JCM "is responsible for the day-to-day management of * * * [the] business affairs of the funds," Pet. App. 65a, the same rule should apply here. A contrary approach would conflict with this Court's admonition "that the statute should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *Zandford*, 535 U.S. at 819 (quotation marks omitted).[10]

2. The nature of the claim in this case is for a primary violation of Section 10(b)

Even if JCM is considered a "secondary actor," it would not be immune from liability here, since "the implied right of action in § 10(b) continues to cover secondary actors who commit primary violations." *Stoneridge*, 552 U.S. at 166 (citing *Central Bank*, 511 U.S. at 191). Petitioners focus (Br. 34-35) on the court of appeals'

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[10] Petitioners further contend (Br. 20) that a "bright-line distinction between issuers and non-issuers also serves the critical goal of fostering 'certainty and predictability.'" As explained above, however, petitioners do not actually argue that only issuers can be held liable for statements made in prospectuses, but rather concede that at least some of the issuer's employees can be liable as well. See Pet. Br. 15, 19, 22. The determination whether a particular employee is liable for a particular false statement necessarily entails an inquiry into the nature and degree of the individual's responsibility for the drafting and issuance of the statement. Although such inquiries do not lend themselves to bright-line rules, any imprecision is an acceptable price for ensuring that employees are adequately deterred from perpetrating frauds in their companies' names.

characterization of respondent's complaint as alleging that petitioners "*helped* draft the misleading prospectuses." Pet. App. 17a, 18a (emphasis added). On that basis, they contend (Br. 34-36) that the court of appeals disregarded this Court's holding that "[t]he § 10(b) implied private right of action does not extend to aiders and abettors." *Stoneridge*, 552 U.S. at 158; see *Central Bank*, 511 U.S. at 191. That argument is misconceived.

Notwithstanding the court of appeals' word choice, respondent's allegations adequately state a claim of primary liability, based on JCM's *own* misrepresentations, and not a secondary-liability claim that JCM merely aided a fraud spearheaded by the Funds. Thus, respondent alleges that petitioners "wrote and represented [their] policy against market timers," Pet. App. 69a; that they "publicly issu[ed] false and misleading statements" regarding that policy, *id.* at 109a; that petitioners "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors," *id.* at 60a; and that petitioners "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [petitioners] would implement measures to curb market timing in the Janus Funds," *ibid.* As the court of appeals correctly concluded, "[t]hese statements, taken together, allege that [petitioners], by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a.

If an outside accountant or lawyer is sufficiently involved in creating or disseminating a statement issued in its client's name, that individual may be said to have "made" the statement (at least "indirectly") and may be subject to Rule 10b-5 liability on that basis. See SEC

PIMCO Br. at 7. The Court need not address that issue, however, in order to rule for respondent here. According to respondent's complaint, JCM perpetrated the alleged fraud by exercising its "responsib[ility] for the day-to-day management of * * * the [F]unds." Pet. App. 65a. Although JCM (like the corporate officers who would more typically manage a company's operations) was subject to oversight by the Funds' trustees, JCM is alleged to have performed the "insider" functions that corporate officers and employees would ordinarily perform, not the advisory role typically associated with outside service providers. If JCM created statements for the Funds' prospectuses that misled investors about how the Funds combated market timing, it can be held liable for its own "direct[] or indirect[]" statements to the market. As courts have recognized in the context of conduits and publicly unidentified corporate employees, such cases involve primary liability, not aiding-and-abetting liability, because the defendant is being held liable for its own conduct—not for merely assisting someone else. See, *e.g.*, *Cooper*, 137 F.3d at 624; see also note 9, *supra* (citing cases involving employees and consultants).

3. Government suits for aiding-and-abetting liability would be an inadequate substitute for primary liability under Section 10(b)

As petitioners point out (Br. 27-28), the Commission is authorized to bring actions against any person who substantially assists another person in violating the Exchange Act. Section 20(e) of the Exchange Act, 15 U.S.C. 78t(e). That authority cannot substitute, however, for a suit that charges a primary violation against JCM for its own false statements.

As a general matter, "[t]his Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); see H.R. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995) ("Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets."). The Commission's authority to bring enforcement actions does not (and is not intended to) obviate the need for the remedial and deterrent benefits that private suits provide.

Moreover, if the Court were to hold that the conduct alleged in respondent's complaint gives rise only to secondary liability, the government's additional powers to pursue a suit for aiding-and-abetting would likely be inapplicable. In order to establish secondary liability under an aiding-and-abetting theory, the Commission must prove that there was an underlying primary violation by the person the defendant is alleged to have aided and abetted. See, *e.g.*, *SEC* v. *DiBella*, 587 F.3d 553, 566 (2d Cir. 2009); *Graham* v. *SEC*, 222 F.3d 994, 1000 (D.C. Cir. 2000). Here, respondent alleges that petitioners "wrote and represented *[their own]* policy against market timers," that the fund prospectuses recited that policy, and that the prospectuses failed to disclose that petitioners "and [their] subsidiaries had, for years, entered into secret arrangements to allow several hedge funds to engage in market timing transactions." Pet. App. 69a, 72a. If those allegations are true, the Funds' trustees may well have been unaware of the allegedly "secret" arrangements (which would have been implemented by

the Funds' day-to-day manager, JCM, and would have made the prospectus statements misleading). And if the Funds (who are not named as defendants in this suit) were unaware that the prospectuses were false and misleading, they likely lacked the scienter necessary to make them primary violators.

Under petitioners' theory, investment advisers who cause false statements to be included in prospectuses without their funds' knowledge—and, more generally, outside service providers who dupe their clients into unknowingly including false statements in company disclosures—would escape Section 10(b) liability altogether. Such wrongdoers would not be primary violators because their false statements were issued in the name of another, and they would not be liable as aiders and abettors because the Commission would be unable to identify any primary violation they had assisted. There is no reason to believe that Congress intended that untoward result.

II. A MAKER OF MATERIAL MISREPRESENTATIONS CAN BE LIABLE IN A PRIVATE ACTION UNDER SECTION 10(b) EVEN WHEN THE MISREPRESENTATIONS ARE NOT DIRECTLY ATTRIBUTED TO THE MAKER

In the alternative, petitioners contend (Br. 44) that "[e]ven if * * * the operative complaint adequately alleges that JCM 'made' the challenged statements," respondent has failed to plead "the reliance element" of a private action under Section 10(b), because the statements at issue here "were not expressly attributed to JCM at the time they were made in the Janus Funds' prospectuses." Contrary to petitioners' contention, a Section 10(b) plaintiff can establish the reliance element of a private cause of action—either through individual-

ized proof or through the "fraud on the market" presumption—without showing that the relevant false statements were attributed to the defendant at the time they were made.[11] But even if proof of attribution were necessary to establish reliance, respondent's allegations would be sufficient to survive a motion to dismiss, since the market would reasonably attribute statements about market timing in the Funds' prospectuses to JCM, in light of its role as the Funds' investment adviser with responsibilities for the Funds' day-to-day management.

A. Reliance Does Not Require Material Misrepresentations To Be Directly Attributed To The Defendant

As petitioners observe, a private plaintiff in a Section 10(b) action "must plead *both* 'a material misrepresentation * * * by the defendant' *and* 'reliance upon the misrepresentation.'" Pet. Br. 44 (quoting *Stoneridge*, 552 U.S. at 157). To establish reliance through the fraud-on-the-market presumption, as respondent seeks to do here, a private plaintiff must show that a material misrepresentation was communicated to the public. Contrary to petitioners' contention, however, a plaintiff can satisfy both those requirements—*i.e.*, can demonstrate that a misrepresentation was publicly disseminated and that the defendant was in fact its maker—without prov-

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[11] Unlike petitioners' first question—about the scope of the term "make" under Rule 10b-5—their second question pertains only to private actions, because it turns on reliance, which is not an element in a criminal prosecution or in a civil-enforcement action brought by the SEC. See, *e.g.*, *Geman* v. *SEC*, 334 F.3d 1183, 1191 (10th Cir. 2003); *United States* v. *Haddy*, 134 F.3d 542, 549-551 (3d Cir.), cert. denied, 525 U.S. 827 (1998); see also *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 295 (1993) (including "a reliance requirement" in an enumeration of the "elements or aspects of the 10b-5 apparatus unique to a private liability arrangement").

ing that the defendant was *known* to have made the statement at the time it was issued. That is especially so when, as here, a statement is valued by the market because it is material and appears in a prospectus.[12]

1. Nothing in this Court's articulations of the fraud-on-the-market presumption suggests that the presumption depends on contemporaneous public knowledge of the identity of a public statement's author. When the Court recognized the fraud-on-the-market presumption in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), it explained that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246. The Court concluded that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations * * * may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247.

In identifying the prerequisites to invocation of the fraud-on-the-market presumption, the Court in *Basic* thus stated that the information must be "material" and "public," but it did not suggest that the information must have been known (at the time it was communicated) to come from the defendant. Nor does petitioners' proposed additional requirement follow logically

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[12] Petitioners also argue briefly (Br. 45 n.10) that, because respondent owned shares of JCG instead of shares of the Funds, it cannot establish a third element of a Section 10(b) action: that there is a "connection between the [alleged] misrepresentation * * * and the purchase or sale of a security." *Stoneridge*, 552 U.S. at 157. That issue, however, which was not decided by the court of appeals, is beyond the scope of the questions on which this Court granted certiorari. Cf. *Wood* v. *Allen*, 130 S. Ct. 841, 851 (2010) (noting that a question may be "related to" or "complementary to" the question presented without being "fairly included in" it) (internal quotation marks omitted).

from the rationale that underlies the fraud-on-the-market presumption. At least as a general matter, the reasonableness of presuming that material, publicly available misstatements about a company are reflected in its share price does not depend on the perceived identity of a statement's maker.

2. As petitioners point out (Br. 51), "the market necessarily places a value on the *source* of information." Cases may occasionally arise in which a defendant can show that, although a statement about a company was communicated to the public, the market disregarded the statement in light of the perceived identity of the speaker. The fraud-on-the-market presumption is rebuttable, and such a showing would be one way of severing "the link between the alleged misrepresentation and * * * the [share] price." *Basic*, 485 U.S. at 248.[13]

Petitioners, however, can make no such showing here. They contend (Br. 51) that "an issuer's statements about its own operations * * * have more value to analysts than a service provider's statements." The alleged false statements at issue in this case, however, to the effect that the Janus Funds had policies in place to prevent market timing, were statements about the Funds' "own operations." If (as petitioners suggest) the market would attach greater weight to such statements when

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[13] Contemporaneous attribution may also be relevant to proving that a particular entity "made" an alleged misstatement. Thus, even if an entity's role in drafting misleading documents is otherwise insufficient to support primary liability, the entity may properly be said to "make" the false statements if it authorizes the documents to be circulated under its own name. See p. 13, *supra* (quoting SEC *PIMCO* Br.). In this case, however, JCM's role in the drafting and dissemination of the Funds' prospectuses was sufficient to support primary liability even though the prospectuses were not expressly attributed to it.

they were perceived to emanate from the Funds' own employees, then the absence of express attribution to JCM would give the statements *more* credibility, not less. It therefore makes no sense to treat the absence of such attribution as a ground for declining to presume reliance.

3. As explained below (pp. 31-32, *infra*), reasonable investors would have attributed to JCM the statements made in the Funds' prospectuses. In other circumstances, however, wrongdoers might seek to defraud investors by concealing their own responsibility for the false statements they draft and disseminate. A particularly deleterious consequence of petitioners' theory is that it would insulate from any private Section 10(b) suit a defendant who concealed not only the truth about a material fact but also its identity as the statement's maker. Such frauds would normally operate, moreover, by creating the false impression that the relevant statements were made by persons having greater credibility than the actual maker. It would be especially perverse to treat the absence of attribution to the defendant as a ground for declining to presume reliance when the defendant falsely attributed the statements to another in order to make them more believable.

4. Contrary to petitioners' contention (Br. 47-49), this Court's decision in *Stoneridge* does not suggest that contemporaneous attribution of a false statement to the defendant is a prerequisite to invocation of the fraud-on-the-market presumption. The Court stated that "reliance is presumed" when a material statement "become[s] public" because "public information is reflected in the market price of the security," which makes it possible to "assume[] that an investor who buys or sells stock at the market price relies upon the statement."

552 U.S. at 159. As in *Basic*, the Court stressed the public and material nature of the information, but it said nothing about the public's knowledge of the source of a public statement.

The Court in *Stoneridge* distinguished between the defendants' "deceptive conduct" (*i.e.*, their participation in transactions that facilitated a third party's effort to mislead its auditor) on the one hand, and "public statements" (concerning the third party's finances) on the other. 552 U.S. at 160-161; see *id.* at 154-155. The Court concluded that the defendants' conduct was unknown to the public and therefore could not have been relied upon by the market. *Id.* at 159, 161. In further holding that the defendant could not be found liable based on the public statements at issue, the Court observed that the defendants had "no role in preparing or disseminating [the issuer's false] financial statements." *Id.* at 155; see *id.* at 161.

The bases on which the Court rejected the Section 10(b) claims in *Stoneridge* have no application here. Respondent does not claim to have relied (or contend that this Court should presume market reliance) on financial transactions that were not disclosed to the public. And unlike in *Stoneridge*, where the Court took as given that the defendants had no role in the drafting or publication of the allegedly misleading financial statements, respondent alleges that JCM controlled the creation and dissemination of the misleading prospectuses as one aspect of its general control over the Funds' affairs.

B. Even If Attribution Were Necessary To Establish Reliance, The Statements Here Were Adequately Attributed To The Investment Adviser

Even if the reliance element of a private Section 10(b) action required contemporaneous public identification of the person who "made" the relevant statements, *express* attribution should not be required when a statement's actual maker is so closely tied to the entity in whose name the statement is made that reasonable investors would have inferred the actual maker's responsibility. Excepting corporate insiders and investment advisers from any direct- or express-attribution requirement would be consistent with the approach taken by courts that have generally required attribution in private Section 10(b) cases. See *PIMCO*, 603 F.3d at 148 n.1, 158 n.6 (exempting "corporate insiders" and parties who are "employed by the issuing firm")[14]; see also *Affco Invs. 2001 LLC* v. *Proskauer Rose, L.L.P.*, No. 09-20734, 2010 WL 4226685, at *6-*9 (5th Cir. Oct. 27, 2010) (following *PIMCO*; requiring attribution for secondary actor's statements); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) (stating that attribution requirement applies to "a secondary actor, such as a law firm or accounting firm"). Such an exception would also account for the policy concerns raised by petitioners' amici about the threat that private suits may pose to true "secondary actors," like "lawyer[s], accountant[s], or bank[s]." *Central Bank*, 511 U.S. at 191.

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[14] In *PIMCO*, the Second Circuit did not apply its attribution requirement to "claims against corporate insiders," and it noted that "investors rely on the role corporate executives play in issuing public statements." 603 F.3d at 158 n.6. The same is true of investors in mutual funds, who expect that virtually everything about a fund is determined by the identity and practices of its investment adviser.

An investment adviser typically exercises a degree of control over a mutual fund that is at least equivalent to that exercised by internal management in other corporations. When the investing public is aware of the relationship between an investment adviser and a mutual fund, investors would naturally infer that statements in the fund's prospectus bear the imprimatur of the fund's investment adviser. Requiring such statements to be formally attributed to the investment adviser would allow advisers to avoid Section 10(b) liability simply by declining to state explicitly what the investing public already knows. Given the complaint's allegations that JCM performed the "day-to-day management" functions typically associated with investment advisers (Pet. App. 59a, 65a; see also Pet. Br. App. 2a (investment advisory agreement authorizing JCM to perform "the management and administrative services necessary for the operation of" one of the Funds)), the court of appeals correctly concluded that reasonable investors would have attributed to JCM the prospectuses' statements about how the Funds dealt with market timing.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2010

AMICUS CURIAE BRIEF

No. 09-525

In the Supreme Court of the United States

JANUS CAPITAL GROUP, ET AL.,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AARP AND NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

AARP is a non-partisan, non-profit organization dedicated to representing the needs and interests of people age fifty and older. AARP is greatly concerned about fraudulent, deceptive and unfair business practices, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect older people from such business practices and to preserve the legal means for them to seek redress. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

A significant percentage of the age fifty and older population in general tends to compose the investing public in the United States markets, and AARP members in particular tend to be investors in those markets. Older persons are frequent targets of financial fraud because they often have significant assets and they look for investment opportunities that will supplement Social Security and other sources of retirement income. As a result, AARP has elevated the need to combat securities fraud and made this issue a high priority. The Association has regularly commented on legislative and regulatory

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[1] In accordance with this Court's Rule 37.6, no party's counsel wrote this brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties' letters consenting to the filing of this brief have been lodged with the Clerk of the Court.

proposals that address investment fraud, filed *amicus* briefs in cases involving the securities laws, and opposed legislative efforts to limit the remedies of defrauded investors.

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has sixty-seven (67) members, including the securities regulators in all fifty (50) states, the District of Columbia, Puerto Rico, and the U.S. Virgin islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities.

NASAA's members are responsible for regulating securities transactions under state law, and their principal activities include registering local securities offerings; licensing the brokers and investment advisers who sell securities or provide investment advice; and initiating enforcement actions to address fraud and other misconduct. They are intimately familiar with the investment offerings and sales abuses confronting their state residents on a daily basis, including mutual fund market timing.

NASAA supports all of its members' activities and it appears as amicus curiae in important cases involving securities regulation and investor protection. Recognizing that private actions are an essential complement to governmental enforcement of the securities laws, NASAA and its members also

support the rights of investors to seek redress in court for investment-related fraud and abuse. NASAA and its members have an interest in this appeal because it will profoundly affect the ability of investors to seek redress in cases where unscrupulous companies and individuals seek to cloak their fraudulent acts through perverse uses of the corporate form.

The resolution of this case will have a significant impact on the integrity of the securities markets and the remediation of securities fraud in those markets. This is of particular concern at this time, to both AARP and NASAA, given the entry of many first-time investors into the market and the responsibility for retirement investing that pensioners have had to assume as a result of the shift in the retirement plan paradigm from defined benefit pension plans (under which employers bear the risk of loss) to defined contribution pension plans (under which plan participants bear the risk of loss).

SUMMARY OF ARGUMENT

Securities fraud litigation initiated by private parties is an essential means of enforcing the securities laws and protecting the integrity of the securities markets for investors and maintaining investor confidence in the markets. The limited resources of the Securities and Exchange Commission are selectively employed and are seldom directed at making securities fraud victims whole. Nowhere is this dynamic more pronounced and more important than in the mutual fund arena.

In this case, the only practical recourse for the complaining investors is against the mutual fund advisers who perpetrated the fraud that is undisputed. The mutual fund itself is a mere shell for the transaction of innocent shareholders' investment activity in the funds. Thus, the fund's advisers participated in the making of the fraudulent statements contained in the fund prospectuses to a greater extent than any other party. Their conduct in so doing constitutes the making of false statements under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10(b), promulgated thereunder.

State securities laws offer no avenue for victims of a large-scale securities fraud of the sort involved in this case.

The involvement of Janus Capital Management ("Janus Management") in the conduct which constitutes securities fraud was sufficient to sweep that entity into the circle of primary actors with respect to the fraud perpetrated on the complaining shareholders. Under securities law statutory construction and common-law principles, Janus Management is accountable in damages for the securities fraud perpetrated upon Janus Capital Group ("Janus Group") investors.

ARGUMENT

I. A SECURITIES FRAUD CLAIM AGAINST JANUS MANAGEMENT IS THE ONLY AVENUE RESPONDENTS HAVE AVAILABLE TO REDRESS THEIR INJURIES.

The answer to the questions presented in this case will have immediate and potentially serious repercussions for the civil enforcement of securities law violations in this country, especially in the mutual fund industry. As financial crimes abound and alternative forums for aggrieved investors remain limited, it is especially important that the federal courts interpret federal law in a way that, to the extent possible, affords meaningful remedies to victims of securities fraud. Upholding the lower court's decision will help accomplish this objective.

A. Private Securities Litigation Is Essential To Deterring And Redressing Securities Fraud.

This Court has long recognized the vital importance of legitimate private securities litigation to the federal enforcement regime for securities fraud. *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *Pinter v. Dahl*, 486 U.S. 622 (1988); *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (observing that "implied private actions are a most effective weapon in the enforcement of the securities laws"); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432

(1964). *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (stating that "private enforcement" of Rule 10b-5 is "a necessary supplement to Commission action."). In these and other decisions, the Court has recognized a strong Congressional policy of favoring private actions as a means of achieving the fundamental goals of our securities laws: fraud deterrence, victim compensation, and the promotion of investor confidence.

At the front end, private securities actions are essential to inspiring compliance with securities laws. As the Commission has explained, "given the limited enforcement resources of the Commission, the private right of action is vital to effective enforcement of Section 10(b)." Brief for the Securities and Exchange Commission as Amicus Curiae in Support of Partial Affirmance at 6, *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). Former SEC Chairman David Ruder noted in 1989 that in earlier years less than ten percent of cases involving securities or commodities had been brought by the government. *See* DAVID S. RUDER, *The Development of Legal Doctrine through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167, 1168 (1989).

William R. McLucas, former Director of the Commission's Enforcement Division, has argued that the private right of action under §10(b) and Rule 10b-5 is necessary to supplement federal enforcement of securities laws, based on "the continued growth in the size and complexity of our

securities market, and the absolute certainty that persons seeking to perpetuate financial fraud will always be among us." *Private Litigation of the Federal Securities Laws: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking Housing & Urban Affairs*, 103d Cong., 1st Sess. 113 (June 17, 1993) [hereinafter *Hearings*] (testimony of William R. McLucas).

Government agencies are generally strangers to the transactions that give rise to allegations of fraud. Private participants in allegedly fraudulent transactions thus have an informational advantage over government agencies and have stronger incentives to prosecute certain alleged frauds because they stand to profit from any recovery. Statistics show that "private enforcement . . . dwarf[s] public enforcement," and thus private litigants are much more successful in terms of recovery than the Commission. JOHN C. COFFEE, JR., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1542-43 tbls. 2 & 3 (2006). In fact, "even in major scandals where the [Commission] has brought its own action, the damages paid in securities class actions are usually (but not always) a multiple of those paid to the [Commission]." *Id.*

Private actions are also able to reach a much broader range of perpetrated frauds. The Congressional mandate and funding for the Commission only allows it reach to prosecute the most flagrant abuses of securities laws. The Commission "does not have the resources to

investigate every instance in which a public company's disclosure is questionable," an issue that would "continue to be the case even if the Commission's resources were substantially increased." *Berner v. Lazzaro*, 730 F.2d 1319, 1322-23 (9th Cir. 1984). *See also* H.R. REP. NO. 355, 98th Cong., 1st Sess., at 6 (1983) ("In recent years, the securities markets have grown dramatically in size and complexity, while Commission enforcement resources have declined."). Nowhere have the limits of the Commission's abilities to stop and prevent fraud been more apparent than the case of Bernard Madoff, who managed to operate a Ponzi scheme for nearly half a century in spite of continuous oversight from the Commission. Further, probing violations in the mutual fund industry has not been a top priority for the Commission. Marcia Vickers, Commentary, *How Eliot Spitzer Makes the SEC Look Stodgy*, BUSINESSWEEK (September 15, 2003) [hereinafter BUSINESSWEEK], *available at* http://www.businessweek.com/magazine/content/03_37/b3849047.htm. ("The real failure has been on the enforcement side. The SEC has done nothing to show that it really means business.").

Private enforcement actions are also an essential tool in compensating victims. Private actions afford victims of fraud the best and often only hope of recovering their losses, something for which government enforcement actions are ill-equipped. As the Commission has explained,

> "When the Commission files an enforcement action, its principal

> objectives are to enjoin the wrongdoer from future violations of the law, to deprive violators of their profit by seeking orders of disgorgement, and generally to deter other violations by seeking civil money penalties. Although the Commission usually makes disgorged funds available for the compensation of injured investors, the amount of investor losses often exceeds the wrongdoer's ill-gotten gains. Private actions, by contrast, enable defrauded investors to seek compensatory damages and thereby recover the full amount of their losses.

Hearings, *supra*, at 113. Thus, while the Commission may seek monetary relief, its remedies are designed primarily to deter violations by making them unprofitable, rather than to make investors whole. And with good reason: the damages in major securities fraud cases can and often do run into the billions of dollars. *See, e.g.*, *Regents of the Univ. of California v. Credit Suisse First Bos.*, 482 F.3d 372, 379 (2007); *In re Global Crossing*, 225 F.R.D. 436, 460 (2004); *see also* Coffee, *supra*, at 1555 (cataloguing settlement amounts in major securities fraud cases). Accordingly, the primary means of compensating injured investors remains the private action.

Finally, and especially important in our current financial downturn, private securities litigation performs a significant role in maintaining

of investor confidence by enforcing the mandatory disclosure system. As this Court recently noted, "The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006). Investor confidence in the integrity of the securities markets is crucial to helping businesses raise the capital they need to expand and keep the lights on. See *Basic v. Levinson*, 485 U.S. 224, 235 n.12 (1988). If investors are prevented from holding corporate actors accountable for their frauds, investors will be far less willing to participate in our securities markets. *See Hearings, supra*, at 145.

Investor confidence takes on particular importance in the mutual fund industry. Speaking of the market timing allegations at the core of this case, an industry analyst stated that "[i]f these charges are proven true, there has been a breach of law that cuts close to the heart of what protects all mutual-fund shareholders." BUSINESSWEEK, *supra* (quoting Russel Kinnel, Director of Fund Analysis, Morningstar). "One of the reasons that funds are so popular is the perception that they're very ethical – they supposedly treat the little guy like the big guy. But clearly, they haven't done that here." *Id.* (quoting Russel Kinnel, Director of Fund Analysis at Morningstar). Adds a hedge fund manager, "Hardly anyone has a clue about all the games mutual funds play." The exodus of investors from the Janus Funds upon learning of the secret market timing deals speaks volumes.

B. The Direct Attribution Standard Promoted By Petitioners Would Severely Restrict The Ability Of Investors To Seek Redress For Their Injuries While Simultaneously Creating Perverse Incentives For Corporate Actors To Engage In Fraud.

If the Exchange Act is to serve as the "indispensable tool with which defrauded investors can recover their losses" that Congress intended, H.R. CONF. RPT. 104-369, 104th Cong., 1st Sess., at 31 (1995); *see Dabit*, 547 U.S. at 81, then actors must be held accountable when their conduct violates the explicit language of § 10(b) and Rule 10b-5, as has occurred in this case involving Janus Management. A strict attribution requirement would instead "place a premium on concealment and subterfuge rather than on compliance with the federal securities laws." *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 333 (S.D.N.Y. 2004) (quoting *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 587 (S.D. Tex. 2002)).

Without recourse against Janus Management, Janus Group shareholders will have nowhere to obtain redress for their injuries. Unlike with previous cases that have come before this court, there are no other "adequate remedies" available to the investors in this case that could "attenuate[]" the heavy disadvantages posed by the restrictive interpretation of securities laws advocated by

Petitioners. *See Blue Chip Stamps*, 421 U.S. at 738 n.9. The Janus Funds may not be sued directly because they "do not 'conduct any operating activities on their own'" and "recovery would simply impose on present shareholders of the funds (entirely innocent parties) liability for a payment to shareholders of the funds during the class period." *In re Mut. Funds Inv. Litig*, 384 F. Supp. 2d 845, 853 n. 3 (D. Md. 2005). At the same time, Janus Management, who as investment adviser is ultimately responsible for formulating and disseminating the misleading prospectuses, will escape liability simply by keeping its name off the prospectuses. Finally, the government actors in this case have been primarily concerned with compensating the injured shareholders of the Janus Funds. None of the fines Janus Group paid as part of its government settlement have been used to compensate Janus Group shareholders. Thus, private action against the investment adviser is the only option parent company shareholders have, making paramount the need for federal courts to afford relief in this case.

Private securities litigation has proven itself a valuable tool in the protection of investors and the deterrence of securities fraud. Applying § 10(b) to the deceptive conduct that occurred between Janus Management, Janus Group and the Janus Funds will not impose duties or uncertainties other than those that arise from the universal and entirely fitting obligation to refrain from making misrepresentations and committing securities fraud. In fact, no policy reason exists to allow persons who

directly participate in transactions designed to mislead investors to escape liability under §10(b). Indeed, such a result would do great harm to investor interests, as it would leave them with no viable means to recover damages sustained as a result of even intentionally deceptive conduct, so long as the wrongdoer avoids making a false statement or assuming a duty of disclosure. Given the complexity of corporate frauds, this will create a significant and unwarranted loophole in Rule 10b-5.

II. PROVIDING INVESTORS WITH MEANINGFUL REMEDIES UNDER FEDERAL LAW IS VITAL GIVEN THE LACK OF AVAILABLE REMEDIES UNDER STATE LAW.

The need to insure that investors have meaningful remedies in federal court is all the more important when state law does not provide an alternative remedy. This is especially true for securities fraud cases in light of the fact that "federal law, not state law has long been the principal vehicle for asserting class-action securities fraud claims." Dabit, 547 U.S. at 88. Furthermore, this Court has observed that the disadvantages posed by a restrictive interpretation of federal securities law can be "attenuated" where adequate remedies are available under state law. *See Blue Chip Stamps*, 421 U.S. at 738 n.9 (weighing fact that class action in state court was an alternative remedy); *see also Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478 (1977) (state cause of action under corporate law was a factor in determining whether to recognize federal

cause of action); *J.I. Case Co.*, 377 U.S. at 434-35 (1964) (noting that if federal jurisdiction is limited and state affords no relief, then the "whole purpose" of the statutory provision might be frustrated). Conversely, where state law does not offer a significant alternative forum for plaintiffs' claims, there is a correspondingly greater justification—and need—for the federal courts to afford relief.

In this case, state law offers limited recourse for investors in the Respondent's position. Congress has expressly limited the use of class action suits seeking recovery for securities fraud under state law. In 1998, Congress enacted the Securities Litigation Uniform Standards Act ("SLUSA") to address the concern that "securities class action lawsuits [had] shifted from Federal to state courts" as a means of circumventing the Reform Act. *See* 15 U.S.C.A. § 78a (findings set forth in Pub. L. 105-353, § 2, Nov. 3, 1998). With certain exceptions, SLUSA provides that no class action based upon state law may be maintained in any state court on behalf of more than 50 class members. *See* 15 U.S.C. § 77p(b). Moreover, state courts generally have not recognized the doctrine of fraud-on-the-market in cases seeking relief under state common law—a doctrine central to Respondent's case—further limiting the state courts as an alternative forum for investors aggrieved by misconduct of the sort alleged in this case. *See, e.g., Peil v. Speiser*, 806 F.2d 1154, 1163 (3rd Cir. 1986) (noting that no states have adopted fraud on the market theory); *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1193-94 (N.J. 2000); *Mirkin v. Wasserman*, 858 P.2d 568, 584 (Cal. 1993).

Precisely because of the massive corporate frauds that have surfaced in recent years, some courts have recognized the need to re-evaluate barriers to civil actions alleging securities fraud. The California Supreme Court, for example, has cited the troubling increase in corporate fraud as a reason to recalibrate the balance between the interests of investors and the interests of corporations, in favor of providing greater judicial recourse to victims of fraud.

> When Congress enacted the Private Securities Litigation Reform Act of 1995 and the Uniform Standards Act of 1998, it was almost entirely concerned with preventing non-meritorious suits. But events since 1998 have changed the perspective. The last few years have seen repeated reports of false financial statements and accounting fraud, demonstrating that many charges of corporate fraud were neither speculative nor attempts to extort settlement money, but were based on actual misconduct. To open the newspaper today is to receive a daily dose of scandal, from Adelphia to Enron and beyond. Sadly, each of us knows that these newly publicized instances of accounting-related securities fraud are no longer out of the ordinary, save perhaps in scale alone. The victims of the reported frauds, moreover, are often persons who were induced to hold

> corporate stock by rosy but false financial reports, while others who knew the true state of affairs exercised stock options and sold at inflated prices. Eliminating barriers that deny redress to actual victims of fraud now assumes an importance equal to that of deterring non-meritorious suits.

See Small v. Fritz Companies, Inc., 65 P. 3d 1255, 1263-64 (Cal. 2003) (internal citations and quotation marks omitted).

III. THE UNIQUELY CLOSE RELATIONSHIP BETWEEN JANUS MANAGEMENT AND THE JANUS FUNDS MANDATES THAT JANUS MANAGEMENT BE HELD ACCOUNTABLE AS A PRIMARY ACTOR.

The Fourth Circuit properly emphasized the special relationship between Janus Management and its family of funds. Contrary to Petitioners' claim, Janus Management is no "mere[] service provider." App. to Pet. Cert 11. Rather, Janus Management is so central to the existence and continued operation of the Janus Funds that the two are practically indistinguishable. *See* Br. for U.S. as Amicus Curiae 9. ("Unlike more typical 'service provider[s] * * * such as an accountant, a lawyer, or a bank,' an investment adviser's unique and close relationship with the fund makes it essentially a corporate insider." (omission in original)).

Consequently, Janus Management's liability in this case should be on par with that of a high-level corporate insider or alter ego. *See* 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41.10 (rev. ed. 2010) (stating that where there is "such unity" between two entities that their legal "separateness . . . has ceased," courts will "disregard the corporate entity" and hold each responsible for acts done in name of the other). Janus Management should therefore be held accountable as a primary actor for the alleged misstatements in the Fund prospectuses. *See McCoy v. Goldberg*, 748 F. Supp. 146, 154 n.5 (S.D.N.Y. 1990) ("Because plaintiff alleges that all representations were made by the individual defendant [Goldberg] and that the corporation is his mere alter ego, it is clear that the misstatements and omissions entail the collective actions of Goldberg and the entity, Goldberg and Co.").

Although the precise analysis varies by jurisdiction, courts generally characterize the insider or alter ego relationship by the presence of three factors. Chief among them is the domination and control of core operational functions by one entity over the other. *See* 1 Fletcher § 41.10 (stating that courts will typically disregard corporate formalities upon a showing of an insider's "complete domination" over the policy and business practices of the entity). *See also In re Blesi*, 43 B.R. 45, 48 (Bankr. D. Minn. 1984) (defining an insider as a person "so tied to or controlled by" an entity as to constitute "an alter ego"); John D. Wilmore, *The Bankruptcy Trustee: Can An Alter Ego Sue In Alter*

Ego?, 65 S. CAL. L. REV. 705, 715 (Nov. 1991) ("The simple domination of a corporation by an insider can be enough to make the insider liable to all those damaged in their dealings with the corporation."). Here it cannot be disputed that liability on the part of the fund is unwarranted so the focus must be solely on the fund adviser, Janus Management.

A related but potentially distinct factor is the lack of an arm's length relationship between the parties. *See, e.g., Pepper v. Litton*, 308 U.S. 295, 306-07 (1939) ("The essence of the [alter ego] test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. If it does not, equity will set it aside.") (footnote omitted); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 418-20 (5th Cir. 2006) (holding that the lower court's skepticism that the entities in question had interacted at arm's length was "critical" to their finding of an alter ego relationship); *Midwest Precision Heating and Cooling, Inc. v. N.L.R.B.*, 408 F.3d 450, 458-59 (8th Cir. 2005). *See also* H.R. REP. NO. 95-595, 95th Cong., 2d Sess., at 312 (1977) (defining "insider" as individuals or entity with a "sufficiently close relationship" to another that its conduct should be subject to closer scrutiny than that of those dealing at arm's length). Earnest scrutiny of the parties' relationships here commands the inclusion of Janus Management within the circle of primary actors for purposes of liability.

Finally, although *amici* agree with Respondent that the facts of this case do not require

it, alter ego liability is generally reserved for cases in which the failure to recognize the economic reality of the relationship between the entities would perpetrate a fraud or injustice against the complaining third party. 1 Fletcher § 41.10 ("If an interoperate affiliation is devised for or is being used to accomplish an improper or unlawful purpose, equity has the authority to tear down technical legal barriers and reach beyond them to impose liability or grant proper relief.") *See, e.g.*, *Carpenters Dist. Council of Kansas City Pension Fund v. JNL Constr. Co.*, 596 F.3d 491, 494-95 (8th Cir. 2010); *Gallagher v. Reconco Builders, Inc.*, 415 N.E.2d 560, 563-64 (Ill. App. Ct. 1980). Although not directly applicable here, the alter ego analysis is instructive and further supports the Fourth Circuit's decision.

> In line with well-settled common law approaches to allocating responsibility among related corporate entities, the inquiry into an alter ego relationship is very fact-intensive and thus peculiar to the circumstances of the case at hand. *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 64 (4th Cir. 1989). No single factor is determinative, so the analysis rests on a careful assessment of the actual relationship between the entities. . *See Ost-West-Handel Bruno Bischoff v. Project Asia Line, Inc.*, 160 F.3d 170, 174-76 (4th Cir. 1998). Although the typical alter ego case is that of an overreaching corporate officer or a close parent-subsidiary relationship, courts

have not shied away from applying the doctrine outside that traditional context. *See Id.* at 172-74 (applying alter ego theory to explore the relationship between record owner of a shipping vessel and the vessel's manager); *Camofi Master LDC v. College Partnership Inc.*, 452 F. Supp. 2d 462, 465 (S.D.N.Y. 2006) (denying an investment adviser summary judgment where a reasonable juror could find that the adviser was an alter ego of its affiliated lending funds).

A. Janus Management Exerts Total Control Over Operations Of The Janus Funds.

Respondent's allegations, bolstered by common understanding of the relationship between mutual funds and their advisers, provide ample support for a claim for primary securities fraud liability against Janus Management.[2] To begin, the control and discretion Janus Management exerted over the policies and core operations of the Janus

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[2] Janus Management, a wholly owned subsidiary of Janus Capital, is the investment adviser to the Janus Funds. J.A. 62a. Janus Management is responsible for the day-to-day management of the Janus Funds investment portfolio and the funds' business affairs; Janus Management provides advice and recommendations regarding the funds' investments; and, Janus Management provides administrative, compliance, and accounting services to the Janus Funds. J.A. 67a-68a.

Funds was virtually unrestrained. Unlike the assistance offered by an outside counsel or financial auditor, control by an investment adviser involves much more than the mere provision of a critical service. *See Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 494 (7th Cir. 1986) (holding that an attorney's ability to persuade and give counsel is not the same thing as "control," which generally means the practical ability to direct the actions of an entity or securities issuer); *Wright v. Schock*, 571 F. Supp. 642, 664 (N.D. Cal. 1983) (holding that providing indispensable services to a broker does not establish a bank or title company as a "control" party), *aff'd*, 742 F.2d 541 (9th Cir. 1984); *In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 484 F. Supp. 253, 268-69 (W.D. Tex. 1979) (holding that giving independent accounting advice does not by itself establish control liability).

The Securities and Exchange Commission defines "control" as "the power to direct or cause the direction of the management and policies of a person" by ownership, contract, or otherwise. *See* 17 C.F.R. §§ 230.405, 240.12b-2 (2008). The analysis must therefore focus on the level of control evidenced by the actual relationship between the entities, rendering the existence or absence of a formal ownership agreement necessarily inconclusive. *See, e.g., United States v. Scherping*, 187 F.3d 796 (8th Cir. 1999) (applying Minnesota law); *Gardemal v. Westin Hotel Co.*, 186 F.3d 588 (5th Cir. 1999); *Shades Bridge Holding Co. v. United States*, 880 F.2d 342 (11th Cir. 1989)). *See also Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1162 (9th

Cir. 1996) (stating that the question of control involves scrutiny of the defendant's "participation in the day-to-day affairs" and power to control the "management and policies" of the entity). Operational control is generally characterized by such factors as the overlap in ownership and management personnel, the ability to make hiring and firing decisions, and the amount of discretion left to the dominated entity. *See, e.g., Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991); *In re City of Columbia Falls, Mont., Special Imp. Dist. No. 25*, 143 B.R. 750, 765-66 (Bankr. D. Mont. 1992).

The domination and control an investment adviser typically exerts over its managed funds is universally acknowledged. *See Daily Income Fund v. Fox*, 464 U.S. 523, 536 (1984); *Tannenbaum v. Zeller*, 552 F.2d 402, 405 (2d Cir. 1977) ("Control of a mutual fund ... lies largely in the hands of the investment adviser."); *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977) ("The term investment adviser is to some a misnomer. The so called adviser is no mere consultant. He is the fund's manager. Hence, the investment adviser almost always controls the fund" and is normally "the only audible voice in day to day management of the fund."); JOHN C. BOGLE, THE BATTLE FOR THE SOUL OF CAPITALISM 142, n.15 (Michael O'Malley ed., Yale Univ. Press 2005) (contending that the structure of mutual funds give investment managers "near-total dominion" over the funds); Investment Company Act Release No. 24082, 64 Fed. Reg. 59,826, 59,827 (Nov. 3, 1999) [hereinafter Release No. 24082] ("An investment

adviser typically organizes a mutual fund and is responsible for its day-to-day operations. As a result of this extensive involvement, and the general absence of shareholder activism, investment advisers typically dominate the funds they advise.").

With rare exception, mutual funds do not operate with their own employees *Cambridge Fund, Inc. v. Abella*, 501 F. Supp. 598, 614 (S.D.N.Y. 1980). Rather, the day-to-day management of the fund is exclusively in the hands of the investment adviser, which provides the fund with management services, office space, and a staff along with its substantive investment advice. *Id.*; *Tannenbaum*, 552 F.2d at 405; BIBB L. STRENCH, *Understanding The Relationship Between the Mutual Fund and Its Adviser*, ABCS OF MUTUAL FUNDS, 72, 74 (P.L.I., New York, N.Y., June 11, 2008) [hereinafter *Understanding Mutual Funds*] ("The mutual fund does not even have its own office but rather 'resides' at the office of the investment adviser.") Officers of the funds are typically employees of, and paid by, the investment adviser. *Id.* at 74. Although the funds have their own directors or trustees, the role of the fund board is merely one of oversight, to approve policies and monitor fund performance for compliance with stated objectives in the prospectus; the boards are not typically involved in day-to-day management, leaving that task to the investment adviser.[3] 2010 INVESTMENT COMPANY FACTBOOK,

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[3] In fact, a 1992 Commission report emphasized that mutual fund directors should not be required to "micro-manage" a fund's daily operations. As a practical matter, fund advisers or administrators typically have compliance officers responsible

APPENDIX A: *How Mutual Funds and Investment Companies Operate*, 191-92 (Investment Company Institute, Washington, D.C., 2010) [hereinafter FACTBOOK], *available at* http://www.ici.org/pdf/2010_factbook.pdf.

"[N]otwithstanding the title, the [a]dviser provides not just advice to the fund, but also discretionary management services." JENNIFER S. TAUB, *Able But Not Willing: The Failure Of Mutual Fund Advisers To Advocate For Shareholders' Rights*, 34 J. CORP. L. 843, 849 (2009) [hereinafter *Able But Not Willing*]. In addition to managing the fund's portfolio, the adviser often serves as the fund administrator, which is specifically charged with various "back office services," including the preparation and filing of reports with the Securities and Exchange Commission. FACTBOOK, *supra*, 191-92. Fund administrators also help maintain compliance procedures and internal controls. *Id.* at 192. Naturally, all of the investment decisions for the funds—including the types and amounts of instruments to be purchased or sold, the execution of these transactions, and the general strategy for the fund—are made by portfolio managers, who are under the employ of the investment adviser.

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for performing the day-to-day compliance checks demanded by the many rules that govern mutual funds, and directors frequently rely on compliance officers to help them fulfill their oversight role. These compliance officers, however, are still typically employed by the investment adviser. UNDERSTANDING THE ROLE OF MUTUAL FUND DIRECTORS, 17 (Investment Company Institute, Washington, D.C., 1999), *available at* http://www.ici.org/pdf/bro_mf_directors.pdf.

UNDERSTANDING MUTUAL FUNDS, *supra*, at 73-74. *Able But Not Willing*, *supra*, at 883.

The allegations in Respondent's complaint align closely with this common understanding of the mutual fund industry. Most notably, Respondent alleges that Janus Management, in its capacity as investment adviser to the Funds, "is responsible for the funds' day-to-day management" and that "as a practical matter" Janus Management runs the funds. J.A. 62a, 73a. In addition to Janus Management sharing physical real estate with the Funds, the prospectuses for the Funds—the Funds' key marketing tool—are most readily available to potential investors via the Janus website, which is run by Janus Group. J.A. 74a. Notably, the Funds lack their own independent websites. Finally, in addition to employing portfolio managers for the Funds, as well as the executives to whom they report, Janus Management "furnishes advice and recommendations concerning the funds' investments, as well as *administrative*, compliance and accounting services for the funds." J.A. 67a. (emphasis added). These allegations state not only a strong claim for Janus Management's essential control over the funds operations but, even more to the point, they describe Janus Management's direction of the market timing policies at issue in this case and the marketing of false statements regarding those policies to potential investors.

B. Janus Management Is So Intimately Involved With The Janus Funds That It Does Not Interact With Them At Arm's Length.

Respondent's allegations also strongly support the notion that Janus Management does not interact at arm's length in asserting its relationship with the Janus Funds.[4] In this case, as is common practice, the mutual funds at issue were actually launched by the investment adviser by and through its parent corporation, Janus Group. *See* Release No. 24082 59,827; UNDERSTANDING MUTUAL FUNDS, *supra*, at 72. As sponsor to the Funds, Janus Group provided the initial seed capital of $100,000 required to start a mutual fund under the Investment Company Act of 1940, 15 U.S.C. § 80-1. FACTBOOK, *supra*, at 190. The sponsor is also involved with registering the fund with the SEC and generally hand-selects all of the third parties needed to launch and operate the fund, including its initial board of trustees.[5] *Id.*; WILLIAM

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[4] As this Court recently noted in *Jones v. Harris*, "because of the relationship between a mutual fund and its investment adviser, the fund often 'cannot, as a practical matter sever its relationship with the adviser. Therefore, the forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy.'" *Jones v. Harris*, 130 S. Ct. 1418, 1422 (2010) (S. REP. NO. 91-184, 91st Cong., 1st Sess., at 5 (1969)).

[5] Although the Investment Company Act requires a certain percentage of the board to be "independent," the SEC has recognized that the legal standard for "independence" is fairly low. "Persons who have served as executives of the fund

A. BIRDTHISTLE, *Compensating Power: An Analysis of Rents and Rewards in the Mutual Fund Industry*, 80 TUL. L.REV. 1401, 1422 (2006). The board of trustees is then charged with "negotiating" the investment contract with the adviser on behalf of the mutual fund. However, proprietary "families" of funds created by a given sponsor generally share administrative and distribution systems, which further increases the likelihood of domination of the sponsor over the funds. *See* Release No. 24082. Not surprisingly, the fund's initial sponsor or an affiliate is nearly always hired by the board to manage the fund. *Id.* Although a fund's board could theoretically fire its investment adviser, such an event is rare in practice and referred to as the "nuclear option" within the industry. *Able But Not Willing*, *supra*, at 883 (citing Meyrick Payne, *Managed Fund Governance*, *in* GOVERNANCE AND RISK: AN ANALYTICAL HANDBOOK FOR INVESTORS, MANAGERS, DIRECTORS AND STAKEHOLDERS 263 (George S. Dallas, McGraw-Hill 2004)). Losing the relationship with the investment adviser would mean that proprietary funds, like the Janus Funds, would have to give up their namesake, making them less easily recognizable and marketable to consumers. Thus,

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adviser or who are close family members of employees of the fund, its adviser or principal underwriter . . . may meet the minimum statutory requirements." Investment Company Governance, Investment Company Act Release No. 26,520, 83 SEC Docket 1384 (July 27, 2004). The SEC further noted that "a fund adviser is frequently in a position to dominate the board because of the adviser's monopoly over information about the fund and its frequent ability to control the board's agenda." *Id.*

mutual funds are essentially captive to their creators. *Id.*; *Gallus v. Ameriprise Fin., Inc.*, 561 F.3d 816, 820 (8th Cir. 2009). *See also Burks v. Lasker*, 441 U.S. 471, 480-81 (1979).

Again, the specific allegations in Respondent's complaint clearly paint a picture of a relationship between Janus Management and its family of funds that lacks any meaningful indicia of functional independence for the funds. In its 10-K, Janus Group self-identifies as a company that "sponsors, markets and provides investment advisory, distribution and administrative services primarily to mutual funds." J.A. 67a. The February 28, 2003, prospectus for the Janus Mercury Fund supports the practical improbability of the "nuclear option," noting that Janus Management "has served as investment adviser to the Janus Funds since 1970, and currently serves as the investment adviser to all of the Janus Funds." J.A. 67a. The complaint cites to a Wall Street Journal article reporting that, as part of its settlement with the New York Attorney General, Janus Group essentially admitted that the Janus Fund boards had not been "truly independent." J.A. 105a-06a. Even months after the Attorney General launched its investigation into Janus, Tom Bailey, the founder and former CEO of Janus Group, was serving as Chairman on all of the Janus Fund boards. Under these circumstances, the Funds would hardly be able to steer a course independent from that which Janus Management and Janus Group had collectively laid out for it.

C. Janus Management And Janus Group Have Navigated The Legal Relationship Between Adviser And Fund So As To Visit A Disservice Upon Janus Group Shareholders.

Finally, a refusal to grant Janus Group shareholders recourse against the company and its wholly-owned investment adviser would surely operate as a grave inequity. The main factor courts have linked with a showing of fraud or injustice is the undercapitalization or insolvency of the dominated entity. *See Keffer*, 872 F.2d at 68. Insolvency and undercapitalization of the dominated entity are strong indicators that it will be unable to fully compensate a complaining party for his or her loss. The court in *Keffer*, for example, found that it would be "fundamentally unfair" for the subsidiary to escape liability where all of the proceeds from its assets, which when sold left the subsidiary insolvent, imbued to its controlling parent. *Id.*

Although the Janus Funds are not technically regarded as undercapitalized or insolvent, for the purposes of recovery in securities fraud actions, they may as well be. A mutual fund is a "mere shell," a pool for other people's assets. It holds no assets other than those belonging to the individual investors holding shares in the fund. *Tannenbaum*, 552 F.2d at 405. As the District Court in this case explained, recovery against the funds for § 10(b) liability "would be inappropriate because a recovery would simply impose on present shareholders of the funds (entirely innocent parties) liability for a payment to

shareholders of the funds during the class period." *In re Mut. Funds Inv. Litig*, 384 F. Supp. 2d at 853 n. 3. Finding otherwise would be "substituting shadow for substance and exalting form over substance in obvious violation of the equities of the situation." *See Wellman v. Dickinson*, 475 F. Supp. 783, 830 (S.D.N.Y. 1979) (internal citations omitted). Janus Management, however, according to the complaint's allegations, not only orchestrated the alleged fraud via its controlling relationship over the Janus Funds, it and its parent Janus Group were the sole beneficiaries of the poisonous fruits of that fraud, namely increased fees from the "sticky assets" the hedge funds pledged to them.

Furthermore, ascribing liability to Janus Management is perfectly consistent with the holding in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), both as to the requirement that there must be a misrepresentation by the defendant and that the deceptive conduct is "necessary" and "proximate" to the alleged fraud. *Id.* at 158, 161.

Unlike the defendants in *Stoneridge*, Janus Management was intimately involved with and benefited from the alleged fraud. As asserted by the Respondents in their complaint, Janus Group Management made material misrepresentations in the prospectuses it prepared for various Janus Funds that explicitly addressed the policies designed to prohibit or otherwise limit market timing. Resp't Br. 19. The plaintiffs also alleged that Janus Group Management caused the prospectuses containing the

misrepresentations to be issued for the Janus Funds and made them available to the public. Resp't Br. 19. Petitioners' attempts to undermine these allegations, which at this stage in the litigation must be taken as true, seem disingenuous to say the least, especially in light of the numerous communications the New York Attorney General uncovered in which senior executives at Janus Group and Janus Management repeatedly reference "our prospectus" and "our funds. See J.A. 45a.

Regardless of whether statements in the Janus Fund prospectuses were directly attributable to Janus Management, Janus Management and Janus Group rendered those statements false by intentionally making secret market timing deals with numerous hedge funds in direct contradiction with the fund prospectuses. It may be fairly presumed that representing that the Funds did not allow market timing attracted investors to the Funds and the secret deals brought in the "sticky assets," thereby maximizing assets under management and increasing the fees that ultimately inured to the benefit of Janus Group. The fraud therefore directly and exclusively benefited Janus Management and its parent, making its participation both proximate and necessary to the fraud.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the decision of the Fourth Circuit.

November 2, 2010

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AMICUS CURIAE BRIEF

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BRIEF FOR ATTORNEYS' LIABILITY ASSURANCE SOCIETY, INC., A RISK RETENTION GROUP, AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE

Founded in 1987, Attorneys' Liability Assurance Society, Inc., A Risk Retention Group (ALAS), is the Nation's leading provider of professional liability insurance for large law firms. ALAS is a mutual insurance company that insures 236 major law firms, including approximately 60,000 lawyers in 45 States and the District of Columbia—approximately one out of every thirteen lawyers in private practice.

Lawyers from ALAS's loss-prevention staff were actively involved in the American Law Institute's development of the Restatement (Third) of the Law Governing Lawyers and in the American Bar Association's recent

revision of the Model Rules of Professional Conduct, and they are involved with many other professional and bar associations that have defined the ethical and professional duties of lawyers. Among other services, ALAS provides its insured attorneys with extensive loss-prevention advice, and it is widely recognized as the leader in that area. As part of its responsibilities, ALAS monitors the defense of professional liability claims asserted against its member firms and lawyers. By virtue of the many services it renders, ALAS has a unique understanding of the problems confronting law firms today. To this end, ALAS has filed amicus briefs addressing issues of vital concern to the Nation's legal community.

This case presents such an issue. ALAS's insured attorneys have advised virtually every significant public company in the United States and have provided legal services to public companies in connection with countless securities offerings. In recent years, plaintiffs have increasingly sought to pursue securities-fraud claims against law firms and lawyers as a result of the provision of those services, even though lawyers are the quintessential example of secondary actors. ALAS files this amicus brief to bring to the Court's attention the consequences of extending securities-fraud liability to lawyers for the advice they provide to their clients—which would harm both the legal profession and the clients it serves.[1]

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[1] Pursuant to Rule 37.6, ALAS affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than ALAS, its members, or its counsel made such a monetary contribution. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office. Counsel for ALAS also represents some of ALAS's members individually in other litigation, including securities litigation.

SUMMARY OF ARGUMENT

A. The issue whether lawyers can be subject to liability for securities fraud typically arises in the context of documents issued by public companies in connection with securities offerings. Although lawyers are often involved in the preparation of those documents, their role is usually a circumscribed one, and lawyers do not sign filings made with the Securities and Exchange Commission (SEC). Instead, lawyers directly speak to the public only through opinion letters that state specific legal opinions about the company or the securities being offered. To date, the courts of appeals have consistently held that lawyers cannot be liable under the securities laws for misrepresentations by their clients, but can be liable for misrepresentations made by, and attributed to, the lawyers themselves.

B. In deciding this case, the Court should make clear that lawyers, as outside service providers, can be liable only for attributed statements. The attribution rule flows directly from the language both of Section 10(b) and of Rule 10b-5. And it is also rooted in the reliance requirement, an essential element of the private right of action under Section 10(b). When a statement is issued by a company, the market rightly presumes that the statement is being "made" by the company, not by an outside service provider such as a lawyer. The practical consequences of a contrary rule would be to permit a private right of action for aiding and abetting against secondary actors such as lawyers and to introduce uncertainty and inconsistency in the application of the securities laws to those actors.

C. A rule that permitted the imposition of securities liability on lawyers and law firms without attribution would have devastating consequences for the legal profession. It would render it virtually impossible for a de-

fendant lawyer or law firm to obtain early dismissal of a private securities-fraud action—and would thereby expose lawyers to the onerous burdens of discovery. Unlike other defendants, moreover, law firms have only a limited ability to settle securities litigation, because law-firm partners are highly mobile and have limited incentives to remain with a firm that is about to pay a sizable settlement. And although lawyers and law firms would initially bear the brunt of liability under any more expansive standard for private securities-fraud actions, the eventual burden would fall on clients and the public at large.

D. Finally, a broader liability rule would disrupt the attorney-client relationship and chill the provision of legal services. Lawyers are not "gatekeepers" of their clients and are not required to investigate their activities. Making lawyers liable for their clients' public statements would effectively impose such a gatekeeping obligation and upset lawyers' professional and ethical obligations to their clients. Lawyers may react to a broader liability rule, moreover, simply by refusing to represent "high-risk" clients, such as newer and smaller companies or companies on the verge of bankruptcy. And a broader liability rule is simply unnecessary to effectuate the remedial goals of the securities laws, because the SEC has the authority to pursue lawyers for aiding and abetting securities fraud and lawyers have powerful incentives not to engage in such misconduct. In sum, extending liability to lawyers for mere participation in the preparation of statements made by their clients would serve little purpose and would work great mischief.

ARGUMENT

LAWYERS CANNOT BE LIABLE IN A PRIVATE ACTION UNDER SECTION 10(b) AND RULE 10b-5 FOR STATEMENTS THAT ARE NOT ATTRIBUTED TO THEM

ALAS agrees with petitioners that, under a proper understanding of the securities laws, petitioners, as mere advisers, should not be liable for statements made in prospectuses by the mutual funds they advised, on the ground that those statements were not attributed to them. ALAS files this amicus brief in order to explain why the Court should make clear that lawyers, as outside service providers, cannot be liable for unattributed statements.

A. Lawyers, Like Other Outside Service Providers, Often Advise Clients In The Preparation Of Their Public Disclosures

1. The issue of whether lawyers can be subject to liability for securities fraud typically arises in the context of documents issued by public companies in connection with securities offerings. Those documents are typically prepared through a collaborative process involving corporate executives and employees; internal legal and accounting personnel; and the company's outside service providers, consisting of lawyers, accountants, and sometimes other consultants. See generally 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 14:6, at 502-503 (West, 2010 ed.).

As a result, it is rarely the case that a single person, much less a single person outside the company, is responsible for any particular document or section thereof. For example, a public filing typically contains a summary presentation of the company's financial data. Information for that presentation ordinarily comes from the business units involved; a group within the corporation

aggregates that information into an initial draft; corporate executives and external and internal counsel will consider revisions to the language; and other executives and external and internal accountants will revise and update the financial information to be included in the filing. As the draft is updated, that process is reiterated. See, *e.g.*, Final Report of Court-Appointed Examiner, App. C, at 82-87, *In re Enron Corp.*, No. 01-16304 (Bankr. S.D.N.Y. Nov. 14, 2003) (Enron Report).

2. Outside legal counsel are most frequently consulted not about specific data, but rather about nuanced questions concerning statements in the filing or the company's reporting obligations more generally. In those circumstances, outside counsel, taking the facts as given, are called upon to advise clients on legal issues as to which the law is not yet settled and reasonable minds could differ as to the correct outcome. In the ordinary case, securities lawyers will devote their attention to complicated legal questions against the backdrop of a relatively small body of facts that inform the analysis on a particular question; they may sometimes be asked to do so where the underlying factual information is either incomplete or in a state of flux. See Association of the Bar of the City of New York, *Report by Special Committee on Lawyers' Role in Securities Transactions*, 32 Bus. Law. 1879, 1884-1886 (July 1977); Robert J. Haft & Michele H. Hudson, *Due Diligence—Periodic Reports & Securities Offerings* § 1:1, at 3 (2009-2010 ed.) (Haft & Hudson); 2 Michael J. Halloran et al., *Venture Capital & Public Offering Negotiation* 36-6 (3d ed. 1997 & Supp. 2009); Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 Geo. J. Legal Ethics 1, 26-27 (2003) (Morgan).

It is therefore rare for outside counsel to develop first-hand knowledge of the business or accounting information that constitutes the core of most disclosures by public companies, including the periodic filings made by those companies with the Securities and Exchange Commission (SEC). Lawyers usually do not have expertise regarding the business or accounting matters discussed in the disclosures. As a result, they ordinarily do not study or confirm the factual information contained therein; that is the job of corporate executives and accountants. And it would not be cost-effective for clients to educate lawyers on those matters, because an understanding of those matters is not essential to the performance of their duties. See Morgan 24-25.

For major disclosures, such as a company's annual Form 10-K filing with the SEC, the company's executives directly sign the filing, pursuant to applicable legal requirements. See 15 U.S.C. 77f(a); 17 C.F.R. 240.13a-14, 240.15d-14. Outside accountants also sign a report stating the results of their audit of the company's financial statements. See 17 C.F.R. 210.2-02; *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 810-811 (1984). Outside counsel, by contrast, do not themselves sign SEC filings. At most, in connection with some public filings (typically initial filings for the issuance of new securities), outside counsel issue a signed opinion letter that states specific legal opinions about the company or about the securities being offered. See, *e.g.*, *Legal Opinion Letters: A Comprehensive Guide to Opinion Letter Practice* §§ 6.2-6.5, at 6-3 to 6-29 (M. John Sterba, Jr., ed., Aspen Publishers 3d ed. 2003 & Supp. 2004) (*Legal Opinion Letters*); Haft & Hudson § 6:2, at 204-208. Law firms carefully vet those opinion letters, which are attributed to the lawyers themselves, before they are issued; firms expend considerable resources verifying the con-

tents of those letters, and many firms have permanent committees that review opinion letters before they are issued in the firms' names. See *Legal Opinion Letters* § 1.6, at 1-21 to 1-23; 1 Gary Lawrence, *Due Diligence in Business Transactions* § 5.13[1] (Law Journal Press 2010).

3. In light of the secondary role outside counsel play in the preparation of public companies' disclosures, the courts of appeals have consistently held that outside counsel cannot be liable under the securities laws for misrepresentations by their clients in those statements. See, *e.g.*, *Pacific Investment Mgmt. Co.* v. *Mayer Brown LLP*, 603 F.3d 144, 161 (2d Cir. 2010) (*PIMCO*) (holding that a law firm was not liable for misrepresentations in a client's SEC filings and offering documents); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205-1206 (11th Cir. 2001) (holding that a law firm was not liable for misrepresentations in a client's press release and letters); *Schatz* v. *Rosenberg*, 943 F.2d 485, 497 (4th Cir. 1991) (holding that a lawyer had no duty to disclose a client's misrepresentations when the lawyer "did no more than 'paper the deal'").

By contrast, courts of appeals have held that outside counsel can be liable where the lawyers undertake to speak directly to a third party or to the public at large: for example, by issuing an opinion letter. See, *e.g.*, *Thompson* v. *Paul*, 547 F.3d 1055, 1063 (9th Cir. 2008) (endorsing view that "[a]n attorney who undertakes to make representations to prospective purchasers of securities" can be liable for those representations); *Rubin* v. *Schottenstein, Zox & Dunn*, 143 F.3d 263, 266-268 (6th Cir. 1998) (en banc) (holding that a lawyer can be liable for the substance of conversations the lawyer had with investors); *Kline* v. *First Western Gov't Securities, Inc.*, 24 F.3d 480, 485-486 (3d Cir. 1994) (holding that a law

firm can be liable for an opinion letter containing misrepresentations).

B. Lawyers, Like Other Outside Service Providers, Cannot Be Liable In A Private Action For Statements That Are Not Attributed To Them

In dismissing claims brought against lawyers and other service providers in a private action under Section 10(b) and Rule 10b-5, lower courts have relied on the "attribution" rule: *i.e.*, the rule that, in order for an outside service provider to be liable for its role in assisting in the preparation of an alleged misstatement, the statement must be attributed to it. *See, e.g., PIMCO*, 603 F.3d at 161 (holding that "[s]econdary actors * * * can be held liable in a private damages action brought pursuant to § 10(b) and Rule 10b-5(b) only for false statements attributed to the secondary actor at the time of dissemination"); *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 153 (2d Cir. 2007) (explaining that "a plaintiff must allege a misstatement that is attributed to the [service provider] at the time of its dissemination, and cannot rely on the [service provider's] alleged assistance in the drafting or compilation of a filing") (internal quotation marks omitted); *Ziemba*, 256 F.3d at 1205-1206 (rejecting claim against a law firm that allegedly played a "significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases" where that role was never disclosed to investors) (internal quotation marks omitted). The attribution rule is grounded in the language of Section 10(b) and Rule 10b-5; the reliance requirement applicable to private Section 10(b) actions; and important public-policy considerations underlying the securities laws. Because the court of appeals' "implicit attribution" rule cannot be reconciled with the attribution rule as properly understood, this

Court should reject that rule—particularly as it is applied to outside service providers such as lawyers.

1. The attribution rule flows directly from the language of Section 10(b) itself, which renders it unlawful for any person to "use or employ * * * any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities. 15 U.S.C. 78j(b). One does not "use or employ" a statement when one has merely "participated * * * in [its] drafting," as the government proposes. U.S. Cert. Br. 11. As this Court has previously acknowledged in another context, the "ordinary or natural" meaning of "use" is to "convert to one's service," "employ," "avail oneself of," or "carry out a purpose or action by means of." *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (internal quotation marks and alterations omitted). All of those definitions denote "action and implementation." *Ibid.* Outside service providers such as lawyers do not "convert" a client's statements to their own "service"; to the contrary, it is the *client* that "avail[s] [it]self" of the *lawyer's* work. To say that a lawyer "use[s] or employ[s]" the client's statements to the marketplace is to turn the meanings of those terms on their heads.

Although the language of Section 10(b) is itself unambiguous, the language of Rule 10b-5 confirms the point. The provision of Rule 10b-5 on which respondents rely makes it unlawful for any person to "make any untrue statement of a material fact." 17 C.F.R. 240.10b-5(b). As a matter of plain language, it is fundamentally different to "make a statement" than it is to "participate[] to a sufficient degree in the drafting or dissemination" of a statement. U.S. Cert. Br. 11. Put simply, to "make a statement" is to *speak* (or to be the attributed speaker of) the statement—not merely to have participated in the creation of a statement that is spoken by (or

attributed to) someone else. Cf. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (noting that an element of a claim under Rule 10b-5 is a "material misrepresentation or omission *by the defendant*") (emphasis added). For example, no one would say that President Reagan's famous statement, "Mr. Gorbachev, tear down this wall," was "made" by his speechwriter, Peter Robinson—even though Robinson drafted the statement. See Peter Robinson, *It's My Party: A Republican's Messy Love Affair with the GOP* 13, 16 (2000). And even if the language of Rule 10b-5 could be read differently, Rule 10b-5 cannot prohibit conduct that Section 10(b) itself does not. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994).

2. The attribution rule is also rooted in the "essential element of the § 10(b) private cause of action" that a private plaintiff must establish reliance. *Stoneridge*, 552 U.S. at 159. In order to satisfy the reliance requirement, the plaintiff must show that he "in fact rel[ied] upon [the defendant's] *own* deceptive conduct." *Id.* at 160 (emphasis added). The necessary corollary of that principle is that, when a plaintiff brings suit against an outside service provider such as a lawyer, the plaintiff must plead and prove that he relied on the service provider's "*own* deceptive statements." *PIMCO*, 603 F.3d at 155-156.

That corollary is hardly a surprising one, because, when one considers whether to rely on a statement (particularly a financial statement), one naturally considers who is making it: *i.e.*, to whom the statement is attributed. See *id.* at 156. It would greatly matter to an investor whether a description of a company's business is being made by the chief executive officer (who should know the company better than anyone) or instead by an outside service provider (whose knowledge of the com-

pany may be partial or specialized). And when a statement is issued by a company, the market rightly presumes that the statement is being "made" by the company, not by an outside service provider—even where the outside service provider is identified in the company's disclosures (and the market is therefore aware of the provider's involvement). See *In re Refco, Inc., Securities Litig.*, 609 F. Supp. 2d 304, 313-314 (S.D.N.Y. 2009), aff'd, *PIMCO*, *supra*; Ben D. Orlanski, Comment, *Whose Representations Are These Anyway? Attorney Prospectus Liability After 'Central Bank,'* 42 UCLA L. Rev. 885, 945 (1995) (Orlanski) ("Who else can be said to represent something in a prospectus if not the company selling its securities?").

As was true with the counterparty to the transaction at issue in *Stoneridge*, moreover, nothing that an outside service provider does makes it "necessary or inevitable" that the provider's client will make a particular statement. *Stoneridge*, 552 U.S. at 161. Even assuming there were ever a situation in which outside counsel singlehandedly drafted a statement that their client then signed and issued, the ultimate decision whether to issue the statement would be made by the client; the client would retain the right to change the statement or simply to issue it as is. See Orlanski 946 (noting attorneys "lack the ultimate authority to control the contents of the prospectus"). And it would presumably be the client that asked for the statement to be prepared in the first place. Even if counsel's involvement in the preparation of the statement was substantial, therefore, there can be no reliance on outside counsel's own conduct as long as the statement is attributed to the client company—and outside counsel thus cannot be liable in a private action under Section 10(b).

3. Important public-policy considerations also support the application of the attribution rule to outside service providers such as lawyers.

a. This Court held in *Central Bank* that a private party may not pursue a Section 10(b) action against a secondary actor on a theory of aiding and abetting liability. See 511 U.S. at 191. In the wake of *Central Bank*, Congress considered, and rejected, a proposal to create an express right of action for aiding and abetting under Section 10(b); instead, Congress chose to authorize only the SEC to seek civil redress against aiders and abettors. See, *e.g.*, 15 U.S.C. 78t(e); S. Rep. No. 98, 104th Cong., 1st Sess. 19 (1995). Allowing liability for a primary violation in the absence of attribution would "revive in substance" private claims against aiders and abettors and would thereby circumvent the congressional judgment not to permit liability in those circumstances. *Stoneridge*, 552 U.S. at 162.

Notably, the government's proffered standard proves as much. The government suggests that a party other than an issuer can be liable for a misstatement where the party merely "participate[s] to a sufficient degree in [its] drafting." U.S. Cert. Br. 11. Yet that is merely aiding and abetting by another name. See, *e.g.*, *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) (noting that "[a]llegations of 'assisting,' 'participating in,' 'complicity in,' and similar synonyms * * * all fall within the prohibitive bar of *Central Bank*").

b. In defining the contours of liability under Section 10(b) and Rule 10b-5, moreover, this Court has repeatedly emphasized the need for "certainty and predictability" in the rules governing liability. *Central Bank*, 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). The attribution rule directly supports that need. The great virtue of the attribution rule is that it provides

clarity to outside service providers such as lawyers. Under the attribution rule, lawyers know that, if statements are attributed to them (as in opinion letters), they will potentially be exposed to securities liability; if statements are not attributed to them, they will not. Lawyers can structure their services accordingly. The attribution rule is easy not only to understand, but also to apply: the issue of attribution can usually be resolved on the face of the pleadings or of the documents referenced therein.

By contrast, any alternative standard, such as the "sufficient participation" standard advanced by the government or the "implicit attribution" standard applied by the court of appeals, affirmatively disserves the need for certainty and predictability. For its part, when the SEC first addressed the issue in the wake of *Central Bank*, it expressly rejected a "*substantial* participation" standard as too "susceptible to misinterpretation"; instead, it advanced a standard under which a person could be liable if he "creates" the statement in question. See SEC Br. at 18-19, *Klein* v. *Boyd*, Nos. 97-1143 & 97-1261 (3d Cir. April 1998) <www.sec.gov/pdf/klein.pdf>. More recently, however, the SEC took a seemingly more expansive view of its "creator" standard, suggesting that a person can be liable for "creating" a statement where the person simply "provides the false or misleading information that another person then puts into the statement." SEC Br. at 7, *PIMCO*, *supra* (Aug. 6, 2009). In ultimately refusing to hold a law firm liable in that case for misrepresentations in a client's filings, the Second Circuit rejected the SEC's standard; in so doing, it observed that "[e]ven the SEC struggles to define the precise contours of [its] creator standard." *PIMCO*, 603 F.3d at 157.

The government now explicitly acknowledges that it favors some form of standard in which "participation" in the creation of a statement is sufficient to give rise to

primary liability. The government continues to struggle, however, to explain what that standard actually means. The government asserts that a statement made under a company's own name "may" give rise to liability—but makes no effort to explain when it does and when it does not. See U.S. Cert. Br. 16 n.7. Instead, the government seemingly suggests that whether participation is sufficient to give rise to primary liability is an issue of fact, potentially to be resolved by a jury at trial. See *ibid.* (noting that "[c]ontemporaneous attribution may also be relevant to *proving* that a particular entity 'made' an alleged misstatement") (emphasis added). But this Court has previously rejected such a "shifting and highly fact-oriented" standard for the imposition of liability in a private action under Section 10(b). *Central Bank*, 511 U.S. at 188 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975)).

The court of appeals' "implicit attribution" standard fares no better in this regard. By the court of appeals' own admission, that standard mandates a "case-by-case" inquiry into whether "interested investors would attribute to the defendant a substantial role in preparing or approving the allegedly misleading statement." Pet. App. 24a. Like the government's "sufficient participation" standard, therefore, that standard would leave for the factfinder the determination as to whether a given fact pattern is sufficient to give rise to primary liability. As a result, application of that standard, like the government's standard, would lead to "the undesirable result of decisions made on an ad hoc basis, offering little predictive value to those who provide services to participants in the securities business." *Central Bank*, 511 U.S. at 188 (internal quotation marks and citation omitted).

Such amorphous standards are not a "satisfactory basis for a rule of liability imposed on the conduct of

business transactions." *Central Bank*, 511 U.S. at 188 (quoting *Blue Chip Stamps*, 421 U.S. at 755).[2] Rather than adopting such a standard here, the Court should make clear that, at least with regard to outside service providers such as lawyers, a provider may be primarily liable for a misstatement only where the misstatement has been attributed to it.

C. A Rule That Permitted The Imposition Of Securities Liability On Lawyers And Law Firms Without Attribution Would Have Devastating Consequences

While both Congress and this Court have recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general," *Blue Chip Stamps*, 421 U.S. at 739,[3] lawyers and law firms are particularly vulnerable to the pernicious consequences of securities litigation. A relaxation of the previously settled attribution rule would expose lawyers and law firms to those consequences with potentially devastating results.

1. To begin with, any relaxation of the attribution rule would render it virtually impossible for a defendant lawyer or law firm to obtain dismissal of a private securities-fraud action at the pleadings stage. In order to in-

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[2] Consistent with the rationale expressed in *Central Bank*, *Blue Chip Stamps*, and other cases, Congress has made the affirmative judgment that the elements of a private claim under Section 10(b) are capable of precise pleading and must be so pleaded on pain of dismissal. See 15 U.S.C. 78u-4(b)(1), (b)(2), (b)(3)(A).

[3] See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (noting Congress enacted securities litigation reform based on "policy considerations similar to those that supported the Court's decision in *Blue Chip Stamps*").

itiate such an action, plaintiffs' counsel would need only to identify some misstatement in a company's public filings and then to allege that the company's outside counsel participated in the drafting of the statement in question. Beyond that, plaintiffs' counsel would need at most to make factual allegations sufficient to associate outside counsel with the company in the mind of an "interested investor," see Pet. App. 24a—for example, by citing a reference to the identity of the advising law firm in the company's disclosures, or even by citing an article in the public domain noting that the law firm was representing the company. Such a complaint "is easy to craft and can be filed with little or no due diligence" on the part of plaintiffs' counsel. S. Rep. No. 104-98, *supra*, at 8.

As a practical matter, therefore, the only means by which a defendant lawyer or law firm will be able to obtain early dismissal of a private securities-fraud action is by invoking the heightened pleading standard for scienter. See 15 U.S.C. 78u-4(b)(2). In applying that standard, however, a court is required to take into account all of the allegations in the complaint. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-323 (2007). And because securities lawyers frequently deal with complex legal questions based on incomplete factual information, see p. 6, *supra*, plaintiffs' counsel may be able to find some misstatement as to which, with hindsight, it could be argued that the lawyer or law firm was reckless in not noticing. Moreover, plaintiffs' counsel may be able to find other would-be defendants, including a company's officers, who have an incentive to point the finger at the lawyer or law firm and claim that they relied on their advice—even if the lawyer or law firm either never gave that advice or did so because they were themselves being misled by wrongdoers at the company. In any of those scenarios, it may be difficult, if not im-

possible, for a defendant lawyer or law firm to invoke the scienter requirement as a basis for dismissal.

2. If a defendant lawyer or law firm cannot obtain dismissal of a private securities-fraud action at the pleading stage, the ensuing discovery can be especially onerous. Plaintiffs' counsel understand that, in light of the fact that virtually all securities class actions are ultimately settled, it is likely that the defendants will ultimately bear both sides' litigation costs. See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1536 (2006). Accordingly, they have every incentive to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Blue Chip Stamps*, 421 U.S. at 741. Indeed, securities litigation poses such dramatic discovery costs that Congress has imposed a mandatory stay on discovery in securities fraud cases until after the court decides the complaint states a claim. 15 U.S.C. 78u-4(b)(3)(B). The burdens of discovery are particularly heavy for law firms, because, unlike most businesses, the product that law firms primarily sell is the time of their people: *i.e.*, their lawyers and staff.

The securities litigation arising from the collapse of Enron presents a case study in the dangers of allowing a complaint to survive based on an amorphous theory of securities liability. Shortly after Enron's collapse, a district court allowed plaintiffs to proceed with claims against Vinson & Elkins (V&E) based on the theory, *inter alia*, that V&E had "draft[ed] and approv[ed]" many of Enron's disclosures. See *In re Enron Corp. Securities, Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 705 n.129 (S.D. Tex. 2002). In the ensuing five years of litigation, V&E produced more than 6.3 million pages of

documents; thirteen V&E lawyers sat for 39 days of depositions and answered approximately 30,000 questions. Notably, that discovery occurred even though the court-appointed examiner in the Enron bankruptcy had concluded, shortly after discovery had begun, that V&E had not drafted Enron's disclosures; that V&E exercised no control over those disclosures; and that V&E's role in the preparation of those disclosures was in fact limited and episodic. See Enron Report, App. C, at 84, 87. Eventually, the plaintiffs voluntarily dismissed their claims against V&E, see *In re Enron Corp. Securities, Derivative & ERISA Litig.*, No. 4:01-cv-03624, 2007 WL 209923 (S.D. Tex. Jan. 24, 2007), but not before the firm had suffered substantial financial and reputational harm as a result of its involvement in the litigation. See Nate Raymond, *Vinson & Elkins Bolsters New York, Global Offices*, American Lawyer.com (Apr. 29, 2008) <tinyurl.com/v-enewyork>.

3. Like other classes of defendants, law firms will usually seek to settle securities litigation, even without regard to the merits of an underlying claim, in light of the financial and reputational harm from litigating a claim and the potentially astronomical damages in the event of a finding of liability. See, *e.g.*, *Stoneridge*, 552 U.S. at 163 (noting that the dynamics of private securities litigation "allow plaintiffs with weak claims to extort settlements from innocent companies").

Perhaps paradoxically, however, law firms are limited in their ability to settle claims, because they do not have the assets to pay large settlements without endangering their well-being. Cf. Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, *Securities Class Action Settlements: 2009 Review & Analysis* 2 (2010) (noting that, in 2009, the average settlement in a securities class action was $37.2 million). Modern-day law firm

partners are highly mobile and have limited incentives to remain with a firm that is about to pay a sizable settlement. See, *e.g.*, Terry Carter, *On the Hunt for Laterals*, A.B.A. J., Oct. 2006, at 27 (noting that "[l]ateral movement among law firms not only has lost its stigma, it has become a way of doing business" and that "[p]artnerships, in many instances, have become more contractual relationships than the traditional mix of personal and professional bonds").

Losing significant numbers of partners, in turn, not only can endanger the firm's ability to attract and retain clients; it can endanger the firm's access to lending facilities, a lifeline for many large law firms. One major law firm was recently forced to dissolve after a wave of partner departures breached a covenant in the firm's primary lending agreement. See News Release, Thelen LLP, *Thelen Management Recommends Dissolution* (Oct. 28, 2008) <tinyurl.com/thelenllpdissolution>. Put simply, every night, the major assets of a law firm pick up their briefcases and go home—and there is no guarantee they will return in the morning.

Indeed, that fate has befallen at least one major law firm already. In 2007, Jenkens & Gilchrist, at one point the largest law firm in Dallas, was driven into dissolution in the wake of a securities class action and investigation arising from the firm's involvement in the creation of tax shelters—work that had primarily been conducted by three lawyers in a branch office. The securities class action was settled in 2005 for $81.5 million. Although the firm likely would have survived the financial impact of the settlement itself, it was destroyed by the waves of departures that took place both before and after the settlement. Even plaintiffs' counsel acknowledged the unfairness of that outcome, stating that "99.9 percent of the people at Jenkens are good people and good lawyers"

but that "[t]here were three bad apples[] and the bad apples upset the applecart in a big way." See Katie Fairbank & Terry Maxon, *How Jenkens & Gilchrist Lost Its Way*, Dallas Morning News, Apr. 1, 2007, at A1.

The current economic environment only exacerbates those pressures. The legal profession has suffered from an unprecedented downturn, with layoffs even at some of the Nation's most prestigious law firms. See, *e.g.*, Jeff Jeffrey, *Brutal Week May Not Be the End of Law Firm Layoffs*, Legal Times (Feb. 17, 2009) <tinyurl.com/brutalweek>. In fact, in 2009, more people were laid off by more law firms than had been reported in all previous years combined. See Kate Neville, *Law Firm Layoffs: Bad Sendoffs Can Be Bad for Business*, National Law Journal (May 28, 2010) <tinyurl.com/badsendoffs>. And this recession, like others, has precipitated an increase in litigation against law firms more generally. See Rachel M. Zahorsky, *Clients, Law Firms Get 'Savage' As Legal Malpractice Claims Increase*, A.B.A. J. Online (Feb. 17, 2009) <tinyurl.com/zahorsky>. With many law firms already at the tipping point, even the most meritless securities-fraud claim could be sufficient to push several over. The attribution rule serves as a vital source of protection against those claims.

4. Although lawyers and law firms would initially bear the brunt of liability under any more expansive standard for private securities-fraud actions, the eventual burden would fall on clients and the public at large. As Judge Boudin has explained, "[n]o one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (concurring opinion). The inevitable long-term effect of an expansion of primary liability for lawyers is an increase in the cost of legal services. Unlike a company and its officers, a lawyer typically does not benefit from

the success or failure of a securities offering; he receives the same hourly rate in either case. If the lawyer is liable for his client's statements, however, it will increase the risk of providing disclosure-related advice. The natural response will be to increase the "reward" for such advice, in the form of higher hourly rates. See Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 Ariz. L. Rev. 639, 649 (1996). The increased cost of legal services will "in turn [be] incurred by the company's investors, the intended beneficiaries of the statute," *Central Bank*, 511 U.S. at 189, and "[t]he cost of capital will * * * increase just as if a wasteful tax had been imposed on capital formation," Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995). In short, expanding liability for law firms under Section 10(b) will make the provision of legal services more expensive – and, as we will now explain, will also make it less effective.

D. A Rule That Permitted The Imposition Of Securities Liability On Lawyers And Law Firms Without Attribution Would Disrupt The Attorney-Client Relationship And Chill The Provision Of Legal Services

By placing substantial pressures on lawyers and law firms, a relaxation of the previously settled attribution rule would have deleterious consequences for the attorney-client relationship with no offsetting benefits.

1. Unlike an accountant, who "[b]y certifying the public reports that collectively depict a corporation's financial status * * * assumes a *public* responsibility transcending any employment relationship with the client," a lawyer is a client's "confidential adviser and advocate." *Arthur Young*, 465 U.S. at 817-818. Lawyers owes a duty of loyalty exclusively to their clients and must render advice consistent with their clients' interests. See Model Rules of Prof'l Conduct R. 1.13(a)-(b),

1.7 cmt. 1. Accordingly, in the ordinary course, lawyers are not permitted to disclose any information about their clients. See Model Rules of Prof'l Conduct R. 1.6(a). That is not to say that lawyers must ignore the interests of the public when advising clients. Lawyers must be aware of their clients' duties to the public, and, if a lawyer learns that a client is engaged in affirmative misconduct, the lawyer under certain circumstances can disclose confidential information. See Model Rules of Prof'l Conduct R. 1.6(b)(1)-(b)(3), 1.13(c).

Subject to those ethical obligations, however, lawyers are not "gatekeepers" of their clients and are not required to investigate their activities. In the wake of recent corporate scandals, the New York City Bar produced a report on whether lawyers should have a gatekeeper-like duty to the public. See Association of the Bar of the City of New York, *Report of the Task Force on the Lawyer's Role in Corporate Governance* (Nov. 2006) (New York City Bar Report) <tinyurl.com/barreport>. The report ultimately rejected the creation of such a duty, reasoning that "[r]ecognition of a duty to the investing public would represent a sea change in the ethical duties of lawyers and potentially in their relationships with clients." *Id.* at 61.

The American Bar Association (ABA) voiced similar skepticism about the creation of such a duty when it expressed its opposition to proposed rules implementing the Sarbanes-Oxley Act that would have done so. See Letter from Alfred P. Carlton, Jr., President, ABA, to the SEC (Apr. 2, 2003) <tinyurl.com/abaletter>. In response to those concerns, when the SEC promulgated its final rules, it decided not to require lawyers to "report out" of the company if they believe that a material violation of the securities laws or of fiduciary duties is reasonably likely, but instead to require them to "report up"

within the corporate hierarchy. See 17 C.F.R. 205.3(b). In so doing, the SEC specifically recognized the professional and ethical obligations that lawyers have to their clients. See 17 C.F.R. 205.3(a).

2. Making lawyers liable for their clients' public statements would impose precisely such a gatekeeping duty and upset lawyers' professional and ethical obligations to their clients. Given the greatly increased risk that they would be defendants in securities litigation alleging misstatements in their clients' disclosures, lawyers would likely react in one of two ways. Some lawyers may be drawn to investigate their clients' disclosures, undertaking a process similar to that used by many law firms before issuing opinion letters in their own names. Other lawyers may take the opposite approach and refuse to investigate their clients' disclosures out of concern that any investigative action could be cited as evidence that they were aware of (or acted with reckless disregard for) the risk of misrepresentations in those disclosures.

In either case, the ability of lawyers to act as advisers to their clients would be seriously compromised, and the relationship of trust between lawyers and clients would be severely disrupted. In the former situation, clients may shield lawyers from information necessary for the lawyers to render effective advice, and the lawyers may be diverted from their primary responsibility of providing that advice. See, *e.g.*, New York City Bar Report 61-62 (noting that "clients would be more guarded in sharing information with their lawyers, and less inclined to include lawyers in meetings to discuss sensitive issues, if lawyers were viewed as having whistle-blowing duties to the investing public"). In the latter situation, lawyers may fail to learn the information necessary to render effective advice and, even where they do so, may fail to

give the candid advice to which their clients are entitled. See Jill E. Fisch & Kenneth M. Rosen, *Is There A Role for Lawyers in Preventing Future Enrons?*, 48 Vill. L. Rev. 1097, 1128 (2003) (noting that "[t]he quality of the attorney's counsel is a function of the quality of information he receives from the client"). There is no valid justification for upending the attorney-client relationship in this fashion.

3. In fact, if lawyers are liable for their clients' public statements, it may have a chilling effect on the provision of legal services more generally. Law firms may not be willing to risk the increased exposure to securities litigation by representing newer or smaller companies, or companies on the verge of bankruptcy. And even with regard to more established companies, law firms may be leery of taking on representations during market downturns or fluctuations, which typically provoke spikes in securities litigation. For example, during the credit crisis of 2008, approximately 100 securities class actions were filed—the most since 2004. See Cornerstone Research, *Securities Class Action Filings, 2009: A Year in Review* 2-3 (2010). Ironically, it is precisely in those instances in which clients are in most need of expert advice from skilled counsel—but law firms are least likely to be willing to provide it.

When a lawyer is reluctant to provide candid advice to a client in need, the party harmed is not just the client; it is ultimately the public at large. This Court has explained that "sound legal advice or advocacy serves public ends." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). As the SEC has previously acknowledged, albeit in a different context, "[c]oncern about his own liability may alter the balance of [a lawyer's] judgment in one direction as surely as an unseemly obeisance to the wishes of his client can do so in the other" and that "nei-

ther is, in the end, truly in the public interest." *In re Carter*, Exchange Act Release No. 34-17597, 1981 WL 384414, at *25 (Feb. 28, 1981). As the SEC correctly concluded, a legal standard that "would permit a lawyer to avoid or reduce his liability simply by avoiding participation in the drafting process[] may well have the undesirable effect of reducing the quality of the disclosure by the many to protect against the defalcations of the few." *Id.* at *24. So too here, it would not be in the public interest for the Court to adopt a liability standard that chills the provision of legal services, and disrupts the attorney-client relationship, without any offsetting benefit.

4. Finally, a rule that permits the imposition of securities liability on lawyers and law firms without attribution is unnecessary to effectuate the remedial goals of the securities laws. As noted above, at the same time that it refused to create an express *private* right of action for aiding and abetting under Section 10(b), Congress expressly authorized the SEC to pursue civil enforcement actions on a theory of aiding and abetting liability for violations of the Securities Exchange Act. See p. 13, *supra*. The existence of those penalties serves as a strong deterrent for lawyers and law firms against participating in fraudulent conduct. As this Court has noted, moreover, the SEC "is not toothless" when it comes to exercising that enforcement authority. *Stoneridge*, 552 U.S. at 166. From 2002 to 2008, the SEC collected more than $10 billion in enforcement actions, see *ibid.*; earlier this year, the SEC collected $550 million from Goldman Sachs to settle one such action alone, see Final Judgment as to Defendant Goldman, Sachs & Co., *SEC* v. *Goldman, Sachs & Co.*, No. 10 Civ. 3229, Doc. No. 25 (July 20, 2009). The present regime also has the virtue of vesting enforcement authority in the SEC, which exercises discretion in commencing enforcement

actions, rather than plaintiffs' counsel. See *Tambone*, 597 F.3d at 452 (Boudin, J., concurring) (noting that "[t]he SEC may select its defendants sensibly; but private litigants have their own incentives"); Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public & Private Enforcement of Rule 10b-5*, 108 Colum. L. Rev. 1301, 1338 (2008) ("The assumption that private enforcers are motivated by profit appears valid in the context of Rule 10b-5.").

Beyond civil penalties, moreover, lawyers and law firms face the risk of disciplinary sanctions for violating codes of professional ethics, which could result in their being deprived of their professions. And beyond even those sanctions, lawyers are largely selling their expertise and reputations—both of which would be called into question if a lawyer were found to have aided in a fraud. Even absent primary liability, therefore, lawyers already have ample incentive to conclude that aiding in a client's fraud is not in their self-interest.

As this Court has observed, "[e]xtending the 10b-5 cause of action * * * no doubt makes the civil remedy more far reaching, but it does not follow that the objectives of the statute are better served." *Central Bank*, 511 U.S. at 188. And that is particularly true where the practical effect of such an expansion would be to "expose a new class of defendants" to securities class actions. *Stoneridge*, 552 U.S. at 164. Extending liability to lawyers for mere participation in the preparation of statements ultimately made by clients would serve little purpose and would work great mischief. In deciding this case, therefore, the Court should make clear that lawyers, as outside service providers, cannot be liable for unattributed statements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

JANUS CAPITAL GROUP, INC. AND
JANUS CAPITAL MANAGEMENT LLC,
Petitioners,

v.

FIRST DERIVATIVE TRADERS,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF LAW PROFESSORS WILLIAM A. BIRDTHISTLE, TAMAR FRANKEL, LYMAN P.Q. JOHNSON, DONALD C. LANGEVOORT, AND MANNING G. WARREN III AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] whose scholarship focuses on federal securities regulation and investment funds. William A. Birdthistle is Assistant Professor of Law at Chicago-Kent College of Law; Tamar Frankel is the Michaels Faculty Research Scholar and Professor of Law at Boston University School of Law; Lyman P.Q. Johnson is the Robert O. Bentley Professor of Law at Washington and Lee University School of Law and LeJeune Distinguished Chair in Law at the University of St. Thomas (Minneapolis) School of Law; Donald C. Langevoort is the Thomas Aquinas Reynolds Professor of Law at Georgetown University Law Center; and Manning G. Warren III is the H. Edward Harter Endowed Chair of Commercial Law at the Louis D. Brandeis School of Law, University of Louisville.

Amici have no financial stake in the outcome of this case but are interested in ensuring a uniform and coherent interpretation of the Securities Exchange Act of 1934 and the regulations promulgated thereunder. We file our brief to urge this Court to clarify the proper scope of liability in private litigation under Section 10(b) of the Exchange Act. We are prompted to submit our brief because the decision in this case may have significant consequences for all American shareholders and their investments.

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[1] No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Counsel for petitioners and counsel for respondent have filed letters with the Clerk of the Court granting blanket consent to the filing of *amicus* briefs. *See* Sup. Ct. R. 37.3.

[2] *Amici* join this brief as individuals and not as representatives of any institutions with which they are affiliated.

SUMMARY OF ARGUMENT

Petitioners seek a novel exception from liability under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") for investment managers who manipulate or deceive their shareholders. So long as those managers perpetrate their malfeasance through a business trust, petitioners contend, such defendants ought to be impervious to lawsuits brought by shareholders. To succeed upon this theory — and thereby to immunize all fund managers — petitioners must persuade this Court to believe two untruths: that the lifeless funds created and controlled by managers enjoy meaningful independent existence; and that managers are simply minions of those funds. In each case, the opposite is true.

When an investment manager suborns market timing in its mutual funds while lying to the public about doing so, the manager misleads both purchasers of its funds and the manager's own investors, whose shares rise or fall upon revenues from fund assets. Yet petitioners argue that investment managers should not be liable for any such violations of Section 10(b) and, consequently, that their investors may never recover: not from the funds, petitioners persuaded the trial court, because those entities are empty shells with "no assets separate and apart from those they hold for shareholders," *In re Mutual Funds Inv. Litig.*, 384 F. Supp. 2d 845, 853 n.3 (D. Md. 2005); nor from the managers, petitioners assert before this Court (at 9), because any false and misleading statements were made solely by the funds, which petitioners now insist are autonomous entities.

The scope of petitioners' Janus-faced, heads-I-win-tails-you-lose theory may apply at present only to the unique structure of mutual funds, but success

before this Court would furnish a blueprint for widespread impunity from securities violations. Any corporation that publicly claims to police the quality of its products while surreptitiously soliciting douceurs to compromise that quality – as an investment manager does in a market-timing fraud – would receive a tutorial on how to evade legal liability. Following petitioners' example, such perpetrators would need only to replicate the structure of mutual funds by forming "another," "different" (Pet. Br. 8, 9), and judgment-proof entity to furnish – via contract – all management functions externally.

This Court can avoid such a perverse and pernicious result by applying the principles of duty and proximity set forth in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). The vital holding of *Stoneridge* is that liability turns on concrete connections between the defendants, the plaintiffs, and the fraud – such as those between investment managers, their shareholders, and market timing – not upon stage-managed formalisms.

A. Investment Managers Exert an Extraordinary Degree of Control over Their Mutual Funds

All three branches of the U.S. government recognize that managers exert an extraordinary degree of control over their funds, in marked contrast to petitioners' characterization of managers as distant and subservient third parties. Just last Term, in *Jones v. Harris Associates L.P.*, 130 S. Ct. 1418, 1422 (2010), this Court noted that it is "typical" for a fund manager to "create[] the mutual fund," "select[] the fund's directors, manage[] the fund's investments, and provide[] other services." The U.S. Senate has noted "the unique structure of this industry" in which

funds are typically "formed, sold, and managed by external organizations, that are separately owned and operated"; that managers "select the funds' investments and operate their businesses" and provide "almost all management services"; and therefore, "a mutual fund cannot, as a practical matter sever its relationship with the adviser." S. Rep. No. 91-184, at 4 (1969), *reprinted in* 1970 U.S.C.C.A.N. 4897, 4901. The Securities and Exchange Commission ("SEC") has stated that "the term 'investment adviser' is to some extent a misnomer" because "[t]he so-called 'adviser' is no mere consultant. He is the fund's manager. Hence the investment adviser almost always controls the fund." *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977) (citations omitted).

Petitioners nevertheless insist that investment managers are, as a categorical matter, "secondary actors" and that any of their alleged malfeasance is therefore too attenuated to trigger liability (at 15-21). Having begged the central question of this dispute by labeling themselves taxonomically too remote to be held liable, petitioners then conclude at each step in their fraud-on-the-market analysis that they are in fact too remote to be held liable.

Yet for proof of this inviolable status, petitioners rely upon a Potemkin array of formalities. Central to all their arguments is the contention that investment managers are merely subaltern "service providers" orbiting funds at great distance, tethered only by the flimsiest thread of contract (at 8). Very much to the contrary, investment managers are prime movers who reign from the center of the mutual fund universe. In the beginning, managers create, incubate, and hold their funds as wholly owned subsidiaries. *See* William A. Birdthistle, *Compensating Power: An*

Analysis of Rents and Rewards in the Mutual Fund Industry, 80 Tul. L. Rev. 1401, 1423-1424 (2006) (noting that managers sustain funds on "life support" by externally providing all fund management). During this period of infancy, when the manager owns every share and every dollar in a fund, the manager and fund execute a contract – which petitioners produce as evidence of independence – whose two signatories are each controlled by the manager. *See generally* 2 Tamar Frankel & Ann Taylor Schwing, *The Regulation of Money Managers* § 12 (2d ed. 2001).

This Court can determine the appropriate extent of liability in these circumstances by applying the guiding principles crystallized in its most recent ruling on Section 10(b) liability, *Stoneridge, supra*. In *Stoneridge*, this Court emphasized the primacy of proximity and duty – rather than empty labels manipulable by *soi-disant* "service providers" – when determining the reach of private rights of action under Section 10(b). 552 U.S. at 158.

B. Investment Managers "Make" the Statements Contained in the Prospectuses of Their Mutual Funds

The dominant role of investment managers helps to explain the two central rulings of the court below: that defendants made the alleged misstatements and that plaintiff-shareholders relied to their detriment upon those statements. In both *Stoneridge* and *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court chose not to confine Section 10(b) liability to the entity to which a public misrepresentation is expressly attributed. To issue such a categorical rule would have been to invite gamesmanship in categorization, whereby perpetrators could escape liability merely by

interposing separate but subservient entities between themselves and their fraud. This case is an archetypal illustration of the circumstances understood but unruled upon in *Stoneridge*, in which one entity may so dominate another that it must be recognized to have made any misrepresentations and therefore to be held liable as a primary violator.

The complaint alleges, and industry practice supports the contention, that the fund manager "wrote and represented [its] policy against market timers," Pet. App. 69a; that it "publicly issu[ed] false and misleading statements" concerning that policy, *id.* at 109a; and that petitioners "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [petitioners] would implement measures to curb market timing in the Janus Funds," *id.* at 60a. Accordingly, the Fourth Circuit reasonably concluded that "[t]hese statements, taken together, allege that [petitioners], by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a.

Were one to conclude that the manager does not make the statements, misleading or otherwise, in a fund prospectus, one would be left to wonder who does. To answer that the fund makes such statements would be to admit circuitously that the manager does so, inasmuch as the fund has no employees and its only officers are employees of the manager, who pays their salaries. To answer that the board of trustees makes such statements would be to misunderstand fundamentally the process by which hundreds of pages of mandatory disclosure are created for each fund every year, a production from

which trustees are almost entirely absent. In fact, the detailed and extensive content of fund disclosure is furnished almost exclusively by the only entity who knows that information: the investment manager actually operating the fund.

In a revealingly inapt analogy, petitioners argue that the President, not his speechwriters, "makes" a speech (at 11). No one familiar with the operation of this industry would ever confuse a mutual fund for the President. In such a comparison, funds are far more akin to a microphone and speakers: necessary instrumentalities that insentiently broadcast the principal's message. The investment manager, of course, is always the principal, writing and broadcasting the communications of its funds. And courts have long since ceased to find inanimate objects guilty for the wrongdoings of those who wield them. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) ("Deodands did not become part of the common-law tradition of this country.").

C. Statements in Mutual Fund Prospectuses Are Attributable to the Funds' Investment Managers

Petitioners argue that putative plaintiffs cannot demonstrate reliance upon any misleading statements in a prospectus unless those statements are "directly attributed" to the manager (at 11-12). Such a strict attribution rule accords with neither the rationale of the fraud-on-the-market theory nor this Court's ruling in *Stoneridge*. Indeed, such a rule would automatically eliminate the possibility of review for a vast universe of fraud and, in so doing, render the *Stoneridge* inquiry into remoteness and attenuation largely irrelevant. Without direct attribution, cases would be disposed of prior to a *Stone-*

ridge analysis; with direct attribution, *Stoneridge* would almost necessarily be satisfied. *See* Donald C. Langevoort, *Reading* Stoneridge *Carefully: A Duty-based Approach to Reliance and Third Party Liability Under Rule 10b-5*, 158 U. Pa. L. Rev. 2125, 2157-2161 (2010).

Consider the numerous cases in which a corporate executive intentionally misleads a journalist or financial analyst, who in turn publishes highly favorable reports without identifying the executive as a source. *See id.* at 2159. Even in the absence of direct attribution, the executive has nevertheless perpetrated a clear fraud on the market. Courts have reasonably responded to such cases by finding the executive liable, yet petitioners' rule would overturn such decisions. *See id.* (citing, *e.g.*, *Cooper v. Pickett*, 137 F.3d 616, 624 (9th Cir. 1997); *Freeland v. Iridium World Commc'ns, Ltd.*, 545 F. Supp. 2d 59, 74-76 (D.D.C. 2008)). The sensible approach, set forth by this Court in *Stoneridge*, is instead to inquire whether the executive engaged in a deceptive scheme and, if so, whether that deception was sufficiently proximate to the statements upon which investors relied. *See id.* A strict attribution rule would senselessly abort the sound analysis of *Stoneridge*.

In this case, however, any notion of public attribution is readily satisfied. Investment managers themselves strive consciously to form a public connection between themselves and their funds. When forming a new fund, the manager typically selects a name that blazons the manager's brand upon the new fund by incorporating the manager's name into the fund's name. Hence, each of the putatively autonomous funds at issue here features "Janus" in its name. Investment managers take direct and volun-

tary measures to persuade the marketplace to attribute the performance of their funds to the operations of their managers.

The marketplace, in turn, reasonably does so. Sophisticated investors familiar with the structure and operation of mutual funds know that statements published by a mutual fund flow from the will of its manager. Less sophisticated investors unaware of any separation between managers and their funds may simply assume that mutual fund shares are products purchased directly from the manager. In either case, the acts of funds are widely attributed to their managers. One wonders to whom else they could meaningfully be attributed. Indeed, were an investment manager to make an exculpatory statement in a fund prospectus, one would readily expect the manager to argue that such statements sufficiently placed the manager's own investors on notice.

As an empirical matter, the marketplace demonstrated its widespread attribution of fund statements to investment managers: upon the public allegation of market timing in mutual funds, stock prices of the accused managers fell rapidly. *See, e.g.*, Riva D. Atlas, *Janus Capital Meets the Enemy And It Is Janus*, N.Y. Times, Nov. 13, 2003, at C1 (noting that Janus Capital lost "more than 20 percent of market value of its shares in recent weeks").

If petitioners were to succeed in their effort to substitute "express" for actual attribution in this analysis, then a critical element of proving Section 10(b) liability would fall within the direct manipulation of perpetrators. As the government noted, to avoid liability, a violator would need only be discreet enough to avoid speaking aloud what the marketplace already knows. U.S. Cert. Br. 16. This Court

should refrain from creating a unique exemption from Section 10(b) liability for investment managers or any future violators who follow their example.

ARGUMENT

I. INVESTMENT MANAGERS EXERT AN EXTRAORDINARY DEGREE OF CONTROL OVER THEIR MUTUAL FUNDS

An investment manager that perpetrates a market-timing scheme in its mutual funds does far more than simply make an untrue statement of material fact in violation of SEC Rule 10b-5. *See* 17 C.F.R. § 240.10b-5(b). Rather, the manager masterminds an intricate fraud upon two different groups of investors simultaneously: the vulnerable long-term purchasers of shares in the manager's mutual funds and the holders of equity in the manager itself. The far-reaching mechanics of market timing reveal the primary role of managers in both operating mutual funds and engineering this particular violation of Section 10b of the Exchange Act.

A. Market-Timing Fraud Involves Control by Investment Managers of an Expansive Array of Mutual Fund Operations

An investment manager orchestrates a market-timing ruse first by luring prey, then by setting predators upon it. The bait are individual, long-term, buy-and-hold investors, whom the manager attracts to its funds with false promises of safety; *viz.*, explicit policies barring market timing. The hunters are institutional traders, such as hedge funds, who move large sums of money rapidly in and out of mutual funds to arbitrage the unusual pricing system of those funds. Market timers' gains come from the dilution of long-term investors' returns. Throughout, the investment manager collects fees from both

groups. *See* Tamar Frankel & Lawrence A. Cunningham, *The Mysterious Ways of Mutual Funds: Market Timing*, 25 Ann. Rev. Banking & Fin. L. 235, 258-259 (2006).

A separate population of investors defrauded by this scheme – which includes the plaintiff in the current dispute – comprises the manager's equity holders, who invested in reliance upon public assurances that the manager disallowed market timing in its funds. When allegations of managers' complicity in market timing came to light, those investors suffered the greatest collapse in their investments as stock prices in managers such as Janus plummeted. *See, e.g.*, Atlas at C1.

To choreograph a market-timing ruse, an investment manager needs – and arrogates for itself – control over all aspects of mutual fund operations: the manager advertises its funds to new purchasers through an affiliated distributor; the manager determines the policies that govern those funds and publicizes them in fund prospectuses that it writes; the manager monitors trading activity in the shares of its funds through an affiliated transfer agent or administrator; and the manager negotiates special arrangements for favored clients such as hedge funds who engage in market timing. *See generally* Frankel & Schwing §§ 12, 21-22, 27, 32.

One prominent example of market timing involves time-zone arbitrage. *See* Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 Harv. J.L. & Pub. Pol'y, 639, 662-665 (2010). Because mutual fund shares are priced only once a day, those prices can quickly become stale. Events on the other side of the world may cause securities of foreign companies to

fluctuate in price. Accordingly, the true value of any U.S. mutual fund holding those foreign securities will change even before the fund's shares are repriced the next day. During those intervals when a fund's price and value do not correspond, a sophisticated market timer can arbitrage the variance by moving large sums of cash into (to capture gains) or out of (to avoid losses) the fund. Of course, the market timer's gains and losses must come from somewhere:

> By moving large blocks of cash into a fund in anticipation of a rise in the fund's value, the market timer dilutes the worth of each individual share of the fund. Although the timer's new cash was not invested in the underlying securities whose value has risen, the investment has increased the number of fund shares outstanding. Thus, with a greater denominator, the NAV [pricing] equation results in profits from positive market movements being shared by a greater number of shareholders.

Birdthistle, 80 Tul. L. Rev. at 1455.

Beyond dilution, however, market timing imposes significant transaction costs upon a fund and thus upon all of its shareholders. The rapid ingress and egress of large amounts of money creates inefficiencies in the management of the fund, as portfolio managers must accommodate large redemptions by either maintaining greater liquidity cushions (which may impose drag upon fund returns) or executing unanticipated trades to liquidate portfolio holdings (which increase fund fees). *See id.* at 1455-1456.

Investment managers, of course, are well aware of these costs and extract a form of payment from the market timers:

> In exchange for the ability to move $25 million rapidly in and out of a particular fund, for instance, a market timer might offer to leave untouched $50 million of "sticky" assets in a different fund in the adviser's complex. Such an arrangement, of course, pits the interests of the shareholders of the timed fund against those of the shareholders in the fund with sticky assets.

Id. at 1456.

In sum, to perpetrate a market-timing fraud, an investment manager must coordinate all major aspects of a mutual fund. The fund itself is little more than the manager's weapon of choice.

B. Investment Managers Dominate the Ordinary Operations of Their Mutual Funds

This Court, the United States Senate, and the Executive Branch have all noted the extraordinary degree of control that managers exert over their funds.

This Court revisited the topic of mutual funds just last Term, in *Jones v. Harris Associates*, and noted that it is "typical" for a fund manager to "create[] the mutual fund," "select[] the fund's directors, manage[] the fund's investments, and provide[] other services." 130 S. Ct. at 1422. In its previous rulings concerning mutual funds, this Court similarly remarked on the unusual proximity of managers to their funds. *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (noting that mutual funds are "typically created and managed by a pre-existing external organization known as an investment adviser") (citing *Burks v. Lasker*, 441 U.S. 471, 481 (1979)). In perhaps the most well-known federal decision on

mutual funds, the Second Circuit noted that Congress "recognized . . . the potentially incestuous relationships between many advisers and their funds." *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 929 (2d Cir. 1982).

The congressional recognition to which the Second Circuit referred exists in a United States Senate Report accompanying the passage of the Investment Company Amendments Act of 1970. The report notes "the unique structure of this industry" in which funds are typically "formed, sold, and managed by external organizations, which are separately owned and operated"; that managers "select the funds' investments and operate their businesses" and provide "almost all management services"; and, therefore, "a mutual fund cannot, as a practical matter sever its relationship with the adviser." S. Rep. No. 91-184, at 4, *reprinted in* 1970 U.S.C.C.A.N. 4901.

On several occasions, the SEC has reiterated the domination of funds by their managers. For instance, the SEC stated that "the term 'investment adviser' is to some extent a misnomer" because "[t]he so-called 'adviser' is no mere consultant. He is the fund's manager. Hence the investment adviser almost always controls the fund." *In re Steadman*, 46 S.E.C. at 920 n.81 (citations omitted).

Indeed, even the managers' own trade association has reported the extensive degree to which managers run their funds, prepare fund prospectuses, and incur consequent liability. *See* Investment Co. Inst. Amicus Brief at 18, *Jones v. Harris Assocs. L.P.*, *supra* ("Mutual fund advisers . . . prepare prospectuses, shareholder reports and other disclosures for which they have liability under the securities laws.").

Petitioners nevertheless protest that investment managers are, as a categorical matter, "secondary actors" and that any of their alleged malfeasance is therefore too attenuated to trigger liability (at 15-21). This argument ignores the relationship of the plaintiff to the defendants but, even on its own terms, it begs the central question of this dispute. By labeling themselves taxonomically too remote to be held liable, petitioners circumvent the substantive fraud-on-the-market analysis set forth in *Stoneridge*.

As proof of their status, petitioners cite an array of formalities in service of their central claim that investment managers are merely subaltern "service providers." And such service is provided, they contend, only pursuant to the same manner of contract entered into by any vendor.

Very much to the contrary, investment managers are prime movers who dominate the center of the mutual fund universe. In the beginning, managers create, incubate, and hold their funds as wholly owned subsidiaries. *See generally* 2 Frankel & Schwing § 12. During this period of infancy, when the manager owns every share and every dollar in a fund, the manager and fund execute a contract – which petitioners produce as evidence of independence – whose two parties are both controlled by the manager. *See* Birdthistle, 80 Tul. L. Rev. at 1423-1424 (noting that managers sustain funds on "life support" by externally providing all fund management).

C. Petitioners' Position Would, if Adopted, Create a Blueprint for Widespread Securities Fraud

In coordinating the elaborate deceptions and arrangements of a market-timing fraud, an investment

manager uses its mutual funds as simple tools. Yet petitioners now argue that, because the manager elected to form those tools as distinct legal entities, the manager ought to enjoy a novel exception from liability under Section 10(b) of the Exchange Act. This argument is erroneous for two reasons.

First and foremost, the managers are primarily responsible for any fraud that at least "coincide[s]" with their own shareholders' purchase of shares. *SEC v. Zandford*, 525 U.S. 813, 825 (2002). The plaintiff in this case purchased shares in the defendant and alleges that the defendant made misleading statements concerning the manner in which the defendant operated its business "in connection with" that purchase. 17 C.F.R. § 240.10b-5. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), this Court held that "one asserting a claim for damages based on the violation of Rule 10b-5 must be either a purchaser or seller of securities." *Id.* at 749. Again, the plaintiff here alleges it purchased stock reflecting a value that was fraudulently inflated by defendants' representations that their funds were patrolled and purged of market timers. Those representations attracted assets from customers who valued that safety, which in turn generated revenues to defendants, which in turn supported the share price. These facts constitute a clear allegation of primary liability under Section 10(b) and Rule 10b-5. *See* 17 C.F.R. § 240.10b-5.

Second, to indulge petitioners' claim that the action here is somehow secondary, one must willingly embrace a pair of falsehoods: that the lifeless funds created and controlled by managers exhibit meaningful independent existence; and that managers are simply minions of those funds. For each claim, the opposite is true.

If petitioners prevail in their argument that investment managers should not be liable for violations of Section 10(b) involving market timing, the consequences would be stark and inequitable: investors in managers would have no ability to recover fraud: they could not do so from the funds, petitioners persuaded the trial court, because those entities are empty shells with "no assets separate and apart from those they hold for shareholders," *In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3; nor from the managers, petitioners assert before this Court (at 9), because any false and misleading statements were made solely by the funds, which petitioners now insist are autonomous entities.

The success of petitioners' heads-I-win-tails-you-lose theory would furnish a blueprint for widespread impunity from securities violations. Any corporation publicly claiming to police the quality of its products while secretly soliciting payments to compromise that quality – as an investment manager does in a market-timing fraud – would receive a clear path to evading legal liability. Following petitioners' example, such perpetrators would need only to reproduce the structure of mutual funds by forming "another," "different" (Pet. Br. 8, 9), and judgment-proof entity to furnish – via contract – all management functions externally.

II. INVESTMENT MANAGERS "MAKE" THE STATEMENTS CONTAINED IN THE PROSPECTUSES OF THEIR MUTUAL FUNDS

With a careful evaluation of the practice by which investment managers dominate their funds, the Fourth Circuit correctly conducted its analysis of plaintiff's fraud-on-the-market claim. Accordingly, it correctly concluded that defendants made the alleged

misstatements and that plaintiff-shareholders relied to their detriment upon those statements.

In its two most prominent examinations of the private right of action under Section 10(b) of the Exchange Act, *Stoneridge* and *Central Bank*, this Court has declined to adopt the rule that petitioners crave: one that would confine Section 10(b) liability to the entity to which a public misrepresentation is expressly attributed. To issue such a categorical rule would have been to invite gamesmanship in categorization, whereby perpetrators could escape liability merely by interposing separate but subservient entities between themselves and their fraud. This case is an excellent illustration of the circumstances understood but unruled upon in *Stoneridge*, in which one entity may so dominate another that it must be recognized to have made any misrepresentations and therefore to be held liable as a primary violator.

Indeed, investment managers of mutual funds satisfy each of the *Stoneridge* criteria that mere aiders and abettors cannot. First, investment managers clearly owe a duty to disclose their true management policies to their own shareholders, whereas Scientific-Atlanta and Motorola owed nothing of the kind to the plaintiff-shareholders of Charter Communications. 552 U.S. at 158-159. Second, managers play a central role in preparing and disseminating public disclosures for their funds, whereas the defendants in *Stoneridge* had no involvement with Charter's financial statements. *Id.* at 160-161. Third, fraud of the sort alleged in this case centers upon "the realm of financing business" and thereby triggers the strictures of Section 10(b) for any perpetrators, unlike the dealings in *Stoneridge*, which

occurred only within the "realm of ordinary business operations." *Id.* at 161.

The complaint alleges, and industry practice supports the contention, that the fund manager "wrote and represented [its] policy against market timers," Pet. App. 69a; that it "publicly issu[ed] false and misleading statements" concerning that policy, *id.* at 109a; and that petitioners "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [petitioners] would implement measures to curb market timing in the Janus Funds," *id.* at 60a. Moreover, the record amply demonstrates that petitioners effectively merged the existence of the funds into their own: regarding control of "business affairs," JA359a-360a, officers, JA250a-258a (all 17 officers of the funds were JCM Vice Presidents), office space (provided by JCM), JA360a, business address (shared by the funds, JCM, and JCG), JA359a, 403a, 431a, and signature, JA275a (the prospectuses were signed simply by "Janus").

In a revealingly inapt analogy, petitioners argue that the President, not his speechwriters, "makes" a speech (at 11). No one familiar with the operation of this industry would ever confuse a mutual fund for the President. In such a comparison, funds are far more akin to a microphone and speakers: necessary instrumentalities that insentiently broadcast the principal's message. The investment manager, of course, is always the principal, writing and delivering the communications of its funds.

Petitioners also offer a linguistic quibble to the contention that an investment manager "makes" a statement by "participating in its preparation, filing,

and dissemination." "Participation," they argue, "is a signifier of secondary action" (at 11). Not so – one can readily use the word without secondary connotations: athletes participate in contests without any suggestion that they aid and abet someone else in doing so. Indeed, some uses of the word actually emphasize primary acts: to identify someone as a participant in a symposium, for example, is to distinguish that person's activity from the audience's passivity.

Yet such argumentation in the alternative is unnecessary. For all the inquiry into circumstances and definitions, petitioners have themselves already answered the central question in this case: JCM admitted in an interrogatory that its in-house attorneys, "Kelley Howes, Bonnie Howe, and other members of JCM's legal department," drafted the prospectuses. JA507a.

III. STATEMENTS IN MUTUAL FUND PROSPECTUSES ARE ATTRIBUTABLE TO THE FUNDS' INVESTMENT MANAGERS

Petitioners argue that putative plaintiffs cannot demonstrate reliance upon any misleading statements in a prospectus unless those statements are "directly attributed" to the manager (at 11-12). Such a strict attribution rule accords with neither the rationale of the fraud-on-the-market theory nor this Court's rulings in *Stoneridge* and *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Indeed, such a rule would automatically eliminate the possibility of review for a vast universe of fraud and, in so doing, render the *Stoneridge* inquiry into remoteness and attenuation largely irrelevant. Without direct attribution, cases would be disposed of prior to a *Stoneridge* analysis; with direct attribution, *Stoneridge* would almost

necessarily be satisfied. *See* Langevoort, 158 U. Pa. L. Rev. at 2157-2161.

> To illustrate why an attribution rule makes no sense, consider a case (similar to many cases that have been litigated) in which a company executive deliberately misleads a securities analyst, who then issues an excessively optimistic buy recommendation without quoting or referring to the executive. The courts' standard and sensible response has been that the executive and, derivatively, the issuer are liable. But this would not follow if we applied a strict attribution test. The better approach – *Stoneridge*'s roadmap – is to ask whether the executive employed a deceptive device or contrivance and, if so, whether it was nonetheless too remote or attenuated from the recommendation on which investors relied.

Id. at 2159 (citing, *e.g.*, *Cooper*, 137 F.3d at 624 (stating that a corporation "cannot escape liability simply because it carried out its alleged fraud through the public statements of third parties") (quoting *Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996)); *Freeland*, 545 F. Supp. 2d at 74-76 (discussing various judicial analyses of liability predicated on misleading analysts)).

In this case, however, any requirement of public attribution is easily satisfied. Investment managers themselves work energetically to form a public connection between themselves and their funds. When creating a new fund, the manager typically selects a name that sears the manager's brand upon the new fund by incorporating the manager's name into the fund's name. Hence, each of the putatively autonomous funds at issue here features "Janus" in its

name. Investment managers take these direct measures to persuade the marketplace to attribute the performance of their funds to the operations of their managers.

The marketplace, in turn, reasonably does so. Sophisticated investors who are familiar with the structure and operation of mutual funds know that statements published by a mutual fund flow from the will of its manager. Less sophisticated investors who are unaware of any separation between managers and their funds may simply assume that mutual fund shares are products purchased directly from the manager. In both cases, the acts of funds will be widely attributed to their managers. One wonders to whom else they could meaningfully be attributed. Indeed, were an investment manager to make a disclosure of material information in a fund prospectus, one would readily expect the manager to argue that such disclosures adequately placed the manager's own investors on notice of that information.

As an empirical matter, the marketplace demonstrated the widespread attribution of fund statements to investment managers: upon the public allegation of market timing in mutual funds, stock prices of the accused managers fell rapidly. *See, e.g.*, Atlas at C1 (reporting that Janus Capital lost "more than 20 percent of market value of its shares").

If petitioners were to succeed in their effort to substitute "express" for actual attribution in this analysis, then a critical element of proving Section 10(b) liability would fall within the direct manipulation of the perpetrators. To avoid liability, a violator need only be discreet enough not to speak aloud what the marketplace already knows. This Court should refrain from creating a unique exemption from

Section 10(b) liability for investment managers or any future violators who follow their example.

IV. AN AFFIRMANCE OF THE DECISION BELOW WOULD NOT CONSTITUTE AN EXPANSION OF SECTION 10(b) LIABILITY

Certainly, there are reasons for Congress and courts to be careful in fashioning the scope of liability in securities class actions under Section 10(b) of the Exchange Act. Frank Easterbrook, Daniel Fischel, and many other commentators have examined the problems of potential remedial overbreadth if shareholders are too readily compensated in a system where securities fraud produces little, if any, net harm to diversified investors. *See* Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. Chi. L. Rev. 611, 638-641 (1985); *cf.* Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 Va. L. Rev. 623, 628-629 (1992) (noting that Easterbrook and Fischel do not address the deterrent effect of social cost, such as where issuers are forced to pay damages that are less than their net gains).

Yet even if accurate compensation did not entirely justify many securities class action suits, effective deterrence does. And deterrence would be welcome in the mutual fund advisory industry. The past decade has seen numerous revelations of fraud and other misconduct across many aspects of the mutual fund advisory business beyond just market timing, such as late trading, fair valuation, and soft-dollar practices. *See, e.g.*, Josh Friedman, *FleetBoston, BofA to Pay $675 Million*, L.A. Times, Mar. 16, 2004, at C1; Tom Lauricella, *Alliance to Cut Fees 20%*, Wall St. J., Dec. 16, 2003, at C1.

When Congress limited the expansion of lawsuits with the Private Securities Litigation Reform Act of 1995, Congress did not choose – then or since – to eliminate Section 10(b) liability altogether. The liability that remains applies squarely to the investment managers of mutual funds that perpetrate market-timing frauds.

CONCLUSION

For these reasons, *amici* respectfully urge this Honorable Court to affirm the ruling of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* G. ERIC BRUNSTAD, JR., ROBERT W. HELM, AND JANE A. KANTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus G. Eric Brunstad, Jr., teaches courses at the Yale Law School on commercial law and other subjects. He began teaching at Yale in 1990 and has also taught at the Harvard Law School. He is a partner at the law firm of Dechert LLP. He has previously prepared and filed *amicus* briefs in matters involving the regulation of the mutual fund industry, including *Jones v. Harris Associates L.P.*, 130 S. Ct. 1418 (2010); and *Northstar Financial Advisers, Inc. v. Schwab Investments*, No. 09-16347, 2010 WL 3169400 (9th Cir. Aug. 12, 2010). He has also prepared and filed with the Court *amicus* briefs in various other matters, including *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). In addition, he has briefed and argued numerous matters before the Court on behalf of a party, including *Schwab v. Reilly*, 130 S.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioners and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

Ct. 2652 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Kentucky v. Davis*, 553 U.S. 328 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in matters before the Court, including *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010); *Central Va. Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992).

Amicus Robert W. Helm is a partner at Dechert LLP and a leader of the firm's Financial Services Practice Group. He represents mutual funds, boards of directors, and investment advisers. He served as co-chairman of the Practicing Law Institute's program on "The Revolution in Mutual Fund Governance" (2004) and serves on the advisory committees of the Mutual Fund Directors Forum and the Independent Directors Council. He has published articles on mutual fund governance and aspects of financial services

regulation. He has served as chairman of the annual policy conference of the Mutual Fund Directors Forum.

Amicus Jane A. Kanter is a senior member and partner in the Financial Services Practice Group at Dechert LLP and has more than 30 years of experience in federal securities matters. She represents numerous investment companies, boards of trustees of such investment companies, and registered investment advisers. She serves on the Board of Directors of the Investment Lawyer and has been responsible for the D.C. Bar Association's continuing legal education program regarding registered investment companies and registered investment advisers for more than a decade. She has written extensively on various topics regarding the governance and regulation of registered investment companies and registered investment advisers. She is a frequent speaker at conferences in the United States and abroad involving securities law issues and has acted as a consultant to foreign governments and regulatory bodies on matters relating to the regulation of securities, securities markets, and specialized issuers such as registered investment companies.

Amici are deeply interested in mutual fund regulation and have written, taught, and lectured on the subject. The purpose of this brief is to address matters that bear on the Court's de-

termination of an important question of law affecting the mutual fund industry: does implied liability under section 10(b) of the Securities and Exchange Act of 1934 exist for the benefit of a plaintiff shareholder of the corporate parent of a mutual fund adviser based on an allegedly misleading mutual fund prospectus where the plaintiff did not actually purchase shares of the mutual fund in question? The undersigned present this brief to address matters bearing on this question, particularly the consequences of Respondent's theory of liability on the regulation of mutual funds and the relevant process by which mutual funds make disclosures to investors.

STATEMENT

The Janus family of mutual funds (the "Janus Funds") are investment companies registered under the Investment Company Act of 1940 ("ICA"). Petitioner Janus Capital Management LLC ("JCM") is the investment adviser to the Janus Funds. Petitioner Janus Capital Group Inc. ("JCG") is the publicly traded corporate parent of JCM.

Like all publicly offered mutual funds, the Janus Funds offer and sell shares to investors by means of a prospectus filed with the Securities and Exchange Commission ("SEC" or "Commission"). The content of the mutual fund prospectus is highly regulated and carefully designed to

provide, in a clear and understandable format, the information investors need in order to make informed investment decisions about a fund. In this case, respondent First Derivative Traders ("First Derivative") alleges that the prospectuses for the Janus Funds were misleading and harmed First Derivative. Critically, however, First Derivative is a shareholder of *JCG*, not the Janus Funds, and does not allege that it ever purchased or sold any shares in the Janus Funds. The issue in this case is whether an implied private right of action under section 10(b) of the Securities and Exchange Act of 1934 extends to these circumstances. It does not.

First Derivative is the wrong plaintiff suing under the wrong disclosure materials. The court below stated that a service provider who "helped draft the misleading prospectuses" of a mutual fund may be held impliedly liable under section 10(b). Pet. App. 17a-18a. This Court, however, has held that there is no aiding-and-abetting implied private liability under this statute. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). First Derivative seeks an exception for mutual fund advisers on the theory that the relationship between advisers and mutual funds is close. Pet'rs Br. 2. But regardless of whatever proximity may exist in the relationship between a mutual fund adviser and its client, First Derivative's theory encounters an even more fun-

damental problem: there is simply no basis to conclude that Congress intended to create implied liability under section 10(b) for the benefit of a plaintiff shareholder of the corporate parent of a mutual fund adviser based on an allegedly misleading mutual fund prospectus where the plaintiff did not actually purchase shares of the mutual fund in question. Moreover, if permitted, First Derivative's expanded theory of liability would have profoundly negative effects on mutual fund prospectus disclosure.

When mutual funds prepare their prospectuses, they and their advisers properly focus on the interests of the investors in the *funds*. Emphatically, they do not properly focus on the interests of the *advisers'* shareholders (let alone the shareholders of an adviser's corporate parent). First Derivative proposes a novel liability rule that would fundamentally change this mandate by expanding dramatically the parties who may sue on the basis of a mutual fund prospectus. Unavoidably, such an expanded liability rule would misdirect the attention of mutual fund boards and their advisers in a manner at odds with the interests of the funds and their shareholders. An implied right of action is the least appropriate vehicle for such an unfortunate novelty. The decision below should be reversed.

SUMMARY OF THE ARGUMENT

The issue before the Court is the proper scope of the implied private right of action under section 10(b) of the Securities Exchange Act of 1934 (the "'34 Act").[2] The expansion of section

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[2] Section 10(b) provides that:

> [I]t is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j. Rule 10b-5 provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange . . . (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a

10(b) liability that First Derivative seeks would unavoidably undermine decades of efforts by the SEC and other industry participants to reform mutual fund prospectus disclosure. These reforms have been motivated by the goal of ensuring that mutual fund prospectuses serve the primary purpose of providing investors in *mutual funds* with the information they need to make informed investment decisions regarding those funds. These reforms have been achieved, in part, through the use of streamlined disclosure forms designed to satisfy applicable regulatory and liability requirements and combat the tendency for "disclosure creep," *i.e.*, the packing of prospectuses with ever increasing amounts of information in an effort to reduce potential exposure to liability. In conflict with this trend, the novel theory of liability that First Derivative proposes would create a conflict of interest on the part of those who participate in preparing the contents of a fund prospectus by forcing them to consider the informational interests of the stockholders of the adviser's parent; would supply a new and compelling incentive for "disclosure creep" in order to avoid liability to those parent

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fraud or deceit upon any person, in connection with the purchase or sale of any security

17 C.F.R. § 240.10b-5.

company stockholders; and generally would divert the focus of the fund prospectus away from those for whose benefit it is designed.

The erosion of decades of reform is particularly ill-advised here because the alleged misrepresentations in the fund prospectuses are too remote to support implied liability for the benefit of a shareholder of the parent company of the investment adviser. This Court has been reluctant to expand the implied private cause of action under section 10(b), and this case does not present a compelling reason to depart from that cautious approach.

Historically, the Court has placed particular emphasis on the practical ramifications and policy considerations of attempted expansions of the implied 10(b) private cause of action, and it is likewise appropriate to consider them here. The expansion of liability under section 10(b) that First Derivative seeks would impose substantial costs on the mutual fund prospectus process to the detriment of ordinary investors who rely on prospectuses to make informed investment decisions. In addition to inviting a return of the "disclosure creep" that the SEC and others have worked hard to counteract, such an expansion of liability would, among other things, increase uncertainty for market participants, increase frivolous litigation, and ultimately increase costs for individual mutual fund inves-

tors. These substantial negative consequences counsel against the proposed further expansion of section 10(b) liability. In any event, the requisite fact-finding and policy choices necessary to support this kind of expanded liability properly fall within the purview of Congress, and it is there that First Derivative should make its case, not here through its inventive litigation theory.

ARGUMENT

A. First Derivative's Theory of Liability Is Contrary to the Evolution of Mutual Fund Disclosure Practice.

The relevant history of mutual fund disclosure practice is one of a narrowing process to make disclosure more accessible and to better serve the interests of mutual fund investors. Through the adoption of a series of more streamlined disclosure forms and practices, the SEC has sought to reduce the quantity and improve the quality of information supplied to fund shareholders. The goal has been to deliver shorter, simpler, and more effective prospectuses that convey information directly material to these shareholders, and not others. First Derivative's theory of liability is contrary to that history and the values that undergird it.

1. The General Regulatory Structure

Mutual funds are subject to a variety of regulatory requirements.[3] To begin with, they must register with the SEC under the ICA. 15 U.S.C. § 80a-8(b). If they offer shares to the public, they must also comply with the Securities Act of 1933 (the "'33 Act"), 15 U.S.C. § 77a, et seq., as well as the '34 Act, 15 U.S.C. § 78a, et seq. Further, a mutual fund's adviser must comply with the Investment Advisers Act of 1940 (the "IAA"). 15 U.S.C. §§ 80b-2(a)(11), 80b-3. In addition, because mutual funds are established under state corporate law, they are also subject to applicable state law requirements.

A mutual fund is governed by either a board of directors or a board of trustees,[4] a majority of which must be entirely independent of the fund's adviser to rely on common exemptive rules under the ICA.[5] The federal securities

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[3] For ease of reference, the term "mutual fund" is used to refer to registered open-end management investment companies subject to the ICA and governed by a board of directors or a board of trustees.

[4] "Director" is defined by the ICA to include trustees. 15 U.S.C. § 80a-2(a)(12).

[5] *See* Role of Independent Directors of Investment Companies, Securities Act Release No. 7932, Exchange Act Release No. 43,786, Investment Company Act Release No. 24,816, 66 Fed. Reg. 3734, 3736 (Jan. 16, 2001). Even for

laws impose numerous requirements on mutual fund boards, including responsibilities regarding the process by which fund disclosure is prepared, reviewed, and updated. *See, e.g.*, 15 U.S.C. § 77k(b)(3) (providing that a director is liable for misstatements of material fact or omissions of material fact in the mutual fund's registration statement unless a director can demonstrate that he or she exercised due diligence in determining that there were no material omissions or misstatements). The independent directors of a mutual fund serve as "watchdogs" for the interests of fund shareholders. *Burks v. Lasker*, 441 U.S. 471, 484 (1979) (quoting *Tannenbaum v. Zeller*, 552 F.2d 402, 406 (2d Cir. 1977)). They do not answer to the stockholders of the adviser

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funds not relying on these exemptive rules, Section 10(a) of the ICA (15 U.S.C. § 80a-10(a)) requires that at least 40 percent of a mutual fund's board must consist of individuals who are not "interested persons." The term "interested persons" is defined in section 2(a)(19) of the ICA (15 U.S.C. § 80a-2(a)(19)) to include persons who have close family or substantial financial or professional relationships with, among other parties, the fund's investment advisers. In practice, independent directors frequently hold a significant majority of board seats. For example, independent directors held 75 percent of board seats in nearly 90 percent of fund complexes participating in the Investment Company Institute/Independent Directors Council Directors Practices Study. *See Overview of Fund Governance Practices 1994-2006*, INV. CO. INST., at 1 (2007), *available at* http://www.ici.org/pdf/rpt_07_fund_gov_practices.pdf.

or of its parent company; indeed, it is their very mission to be independent of those stockholders and look out solely for the interests of the fund and its investors.

2. The Registration of Mutual Funds and the Early History of Form N-1A

Pursuant to section 7 of the ICA (15 U.S.C. § 80a-7), mutual funds must register in order to engage in the sale of their securities through the mails or by any means or instrumentality of interstate commerce. Mutual funds themselves register under section 8 of the ICA (15 U.S.C. § 80a-8) and register their securities under the '33 Act pursuant to section 24 of the ICA (15 U.S.C. § 80a-24). Among other requirements, mutual funds must prepare a prospectus in order to offer and sell shares. Mutual funds may register and offer their shares using Form N-1A. Form N-1A, Registration Statement of Open-End Management Investment Companies, 17 C.F.R. §§ 239.15A, 274.11A (2010). Notably, the relevant registrant using Form N-1A is the mutual fund itself, not its adviser. *See* Registration Form Used by Open-End Management Investment Companies, Securities Act Release No. 7512, Exchange Act Release No. 39,748, Investment Company Act Release No. 23,064, 63 Fed. Reg. 13916, 13946 (Mar. 23, 1998) ("1998 N-1A Adopting Release") (defining "Registrant" as "an open-

end management investment company registered under the Investment Company Act").

Over the years, mutual fund prospectuses grew to be cumbersome and unwieldy, containing large amounts of complex data of limited use to the average investor. The inclusion of such voluminous amounts of data was due in no small measure to concerns over liability in the event a particular item of omitted information was determined subsequently to have been a material omission. As is relevant here, in 1983, the SEC adopted the first of a series of reforms designed to streamline and simplify mutual fund prospectus disclosure, resulting in the initial creation of Form N-1A (replacing the original Form N-1) and its subsequent revision. Registration Form Used by Open-End Management Investment Companies; Guidelines, Securities Act Release No. 6479, Investment Company Act Release No. 13,436, 48 Fed. Reg. 37928 (Aug. 22, 1983) ("1983 N-1A Adopting Release").

In 1982, the SEC observed that "[u]nder existing requirements prospectuses provide extensive disclosure about all aspects of a [mutual fund's] operations." Registration Form Used By Open-End Management Investment Companies; Proposed Guidelines, Securities Act Release No. 6447, Investment Company Act Release No. 12,927, 48 Fed. Reg. 813, 814 (Jan. 7, 1983) ("1982 N-1A Proposing Release"). Remarking on

the complexity of these disclosures, the SEC commented that it believed "that in practice [mutual fund] prospectuses may not be effective disclosure documents for most investors." *Id.* The Commission recognized that most of the information contained in these prospectuses could be defended as arguably material to some investors under some circumstances, but worried that "the size and complexity" of mutual fund prospectuses would "discourage many fund investors from reading and understanding the entire document." *Id.* The Commission opined further that existing prospectuses appeared to "contain more detail than [was] necessary for most investors to make an informed investment decision." *Id.* The Commission believed that investors would be better served if they were provided with "substantially" shorter and simpler disclosure materials. *Id.*

In order to achieve this goal, the SEC determined that it was "necessary to eliminate certain types of information from the prospectus, so that only matters of fundamental importance to most mutual fund investors [would] be included in the prospectus." *Id.* On the other hand, the SEC recognized that some fund investors, such as institutional investors (*e.g.*, pension funds), might want more extensive information. In order to provide useful information to the majority of individual investors, while also addressing the informational needs of institutional investors,

the Commission invoked its authority under section 10 of the '33 Act and proposed new Form N-1A. Under the new form, investors would receive simplified prospectuses, with more extensive information available on request in the form of a Statement of Additional Information. *Id.*

Comments submitted to the SEC in response to its proposal were "overwhelmingly in favor of the Commission's goals" of, among other things, "simplifying the disclosure provided to investors." 1983 N-1A Adopting Release at 37930. At the same time, the Commission recognized that "some [mutual funds] using Form N-1A may be concerned that omitting information from the simplified prospectus could expose them to liability" for the use of a prospectus that fails to state a material fact. *Id.* at 37930. The Commission noted:

> In addition to the specific private rights of action provided in sections 11 and 12 of the 1933 Act, section 17(a) (15 U.S.C. [§] 77g(a)) of the 1933 Act and rule 10b-5 (15 U.S.C. [§] 78j(b)) under the Securities Exchange Act of 1934 may also need to be considered if a person includes in a prospectus an untrue statement of a material fact or omits to state a material fact that is necessary in order to make the infor-

> mation required in the prospectus not misleading.

1982 N-1A Proposing Release at 818 n.4.

To help quell such liability concerns and encourage use of the new form in spite of the liability risks it potentially entailed, the Commission determined that the simplified prospectus would "meet the standard of section 10(a) of the 1933 Act." 1983 N-1A Adopting Release at 37930. The SEC intended that, notwithstanding its brevity, "the simplified prospectus [would] contain all the information that is 'necessary or appropriate in the public interest or for the protection of investors.'" *Id.* In August of 1983, the Commission formally adopted new Form N-1A. *Id.*

3. The 1998 Revisions

In spite of the SEC's efforts to simplify disclosure, prospectuses under the new form nevertheless "gradually fell victim to 'disclosure creep,' and the so-called 'simplified prospectus' became bloated and unwieldy." Paul Schott Stevens, President & CEO, Inv. Co. Inst., ICI President's Remarks at the Mutual Funds and Investment Management Conference: Less and More: A Better Approach for Informing Fund Investors, (Mar. 17, 2008), *available at* http://www.ici.org/pressroom/speeches/ci.08_mfim_stevens_spch.

print ("ICI Speech"); *see also* Matthew P. Fink, President, Inv. Co. Inst., ICI President's Keynote Address at the Mutual Funds and Investment Management Conference (Mar. 17, 1997), *available at* http://conferences.ici.org/pressroom/speeches/ci.97_MFIMC_FINK_SPCH.print ("Time and again the SEC and the industry have tried to simplify the fund prospectus. But it seems that disclosure creep always sets in, and the 'simplified' prospectus soon becomes as unwieldy as its predecessor.").

As a result, less than fifteen years after the adoption of Form N-1A, the Commission sought to revise the form. *See* Registration Form Used by Open-End Management Investment Companies, Securities Act Release No. 7398, Exchange Act Release No. 38,346, Investment Company Act Release No. 22,528, 62 Fed. Reg. 10898 (Mar. 10, 1997), corrected 62 Fed. Reg. 24160 (May 2, 1997) ("1997 N-1A Proposing Release"). According to the summary accompanying the 1997 N-1A Proposing Release, the amendments to the form sought, "in keeping with the purpose of Form N-1A, to focus prospectus disclosure on essential information about a particular fund that would assist an investor in deciding whether to invest in that fund." *Id.* In March of 1998, the SEC adopted the proposed amendments to Form N-1A. 1998 N-1A Adopting Release at 13916.

In a companion release to the 1997 N-1A Proposing Release, the SEC also proposed a new rule to allow investors to purchase mutual fund shares based on an optional "fund profile" that would provide a summary of key information about the particular fund. Proposed New Disclosure Option for Open-End Management Investment Companies, Securities Act Release No. 7399, Investment Company Act Release No. 22,529, 62 Fed. Reg. 10943 (Mar. 10, 1997), corrected 62 Fed. Reg. 24160 (May 2, 1997). The SEC adopted this proposal the following year. New Disclosure Option for Open-End Management Investment Companies, Securities Act Release No. 7513, Investment Company Act Release No. 23,065, 63 Fed. Reg. 13968 (Mar. 23, 1998). The mutual fund industry, however, did not embrace the optional fund profile approach, among other reasons due to fear of potential liability. *See* ICI Speech (explaining that "[t]he Commission provided no insulation from shareholder lawsuits complaining that the document – by design, of course, a profile – omitted some information. . . . As a result, fund companies chose not to use the Profile").

4. The 2009 Revisions

The modest 1998 reform efforts did not achieve their purpose, and fund disclosures remained cumbersome and unwieldy. Although many recognized the potential value to investors

of shorter, more focused prospectuses, the industry continued to fear that truncated disclosures could in and of themselves lead to liability. As explained by Andrew J. Donohue, Director of the Division of Investment Management of the SEC, "the potential for 'disclosure creep' can create disclosure documents that are so dense that the information simply serves as methods for firms to avoid liability, rather than assisting investors in making investment decisions." Andrew J. Donohue, Director, Div. of Inv. Mgmt. U.S. SEC, Speech by SEC Staff: Luncheon Address Before a Meeting of the Business Law Section of the American Bar Association Committee on Federal Regulation of Securities (Apr. 24, 2010), *available at* http://www.sec.gov/news/speech/2010/spch042410ajd.htm.

Following the 1998 amendments, investor advocates and representatives of the mutual fund industry renewed their criticisms of mutual fund prospectuses as "long and complicated." Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Securities Act Release No. 8861, Investment Company Act Release No. 28,064, 72 Fed. Reg. 67790, 67810 (Nov. 30, 2007). In November of 2007, the Commission responded by proposing once again a reworked disclosure framework intended to provide investors with information that is "easier to use and more readily accessible." *Id.* at 67812.

To implement this framework, the SEC proposed amendments to Form N–1A to require prospectuses to provide a summary containing key information, identified "as information that is important to most investors in selecting mutual funds." *Id.* at 67792. Intending to avoid the mistake that doomed the profile prospectus (*i.e.*, the lack of insulation from shareholder lawsuits alleging that the shortened document omitted certain information required to be in a prospectus pursuant to section 10 of the '33 Act), the SEC conceived its summary document proposal as part of the prospectus delivery process itself, supplying "a new option for satisfying the prospectus delivery obligations with respect to mutual fund securities under the Securities Act." *Id.* Under this regime, investors receive the summary in connection with their purchase of shares in the fund. Upon request, they may also receive the longer form prospectus, as well as the supplemental Statement of Additional Information, both of which may be incorporated by reference into the summary prospectus. These amendments were adopted in January of 2009. Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, Securities Act Release No. 8998, Investment Company Act Release No. 28,584, 74 Fed. Reg. 4546 (Jan. 26, 2009).

As the Commission stated, the point of all of this was to counteract "disclosure creep" and "help investors who are overwhelmed by the choices among thousands of available funds described in lengthy and legalistic documents to access readily key information that is important to an informed investment decision." *Id.* at 4549. Consistent with this purpose, it would be illogical and counterproductive to layer on top of this evolved disclosure regime an implied liability scheme designed to focus the disclosure activities of mutual fund investment companies and their advisers on persons *other than* the investors in the mutual funds themselves. To do so would simply serve to distort the disclosure process and encourage "disclosure creep" as a means to avoid the new liability. Inevitably, of course, that is precisely what First Derivative's proposed liability rule would accomplish. First Derivative's proposal is unsound.[6]

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[6] The danger of this approach is magnified in a case like this one, where the complaint at issue is fundamentally an omissions claim, that is, where the complaint alleges not that the statements made in the fund prospectus were false in themselves, but rather that they should have been accompanied by additional disclosure to prevent creating a misleading impression. *Cf. In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 864 (D. Md. 2005) (a case brought by Janus fund shareholders based on the same disclosure, which required analysis of whether the claims alleged can be characterized primarily as omissions or misrepresentations) ("The gravamen of plaintiffs' claim is

B. The Section 10(b) Private Cause of Action Should Not Be Extended in the Manner that First Derivative Advocates Because Allegedly Misleading Fund Prospectuses Are Too Remote to Create Liability in Favor of Purchasers of Stock in the Adviser's Corporate Parent.

Under this Court's precedents, First Derivative's theory is also unsound as an unwarranted extension of potential liability in private actions brought under section 10(b). First Derivative seeks recovery pursuant to Section 10(b) of the '34 Act, 15 U.S.C. § 78j, and Rule 10b-5(b) promulgated thereunder, which proscribes fraud "in connection with the purchase or sale" of securities, 17 C.F.R. § 240.10b-5(b). While the text of the statute does not provide for a private cause of action, "the Court has found a right of action implied in the words of the statute and its implementing regulation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (citing *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)). This judicially created private cause of

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not for specific misrepresentations, but for the funds' failure to disclose that they were permitting favored customers to engage in late trades and market-timed transactions.")

action is not limitless, however, and the Court has explained that it must be "judicially delimited" because "the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 747-49 (1975). Accordingly, "[t]hough it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." *Stoneridge*, 552 U.S. at 165; *see also Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.").

Consistent with these principles, the Court has frequently curtailed efforts to expand the scope of liability under the implied section 10(b) private cause of action. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Court declined to extend its reach to include aiding and abetting liability. 511 U.S. 164, 184 (1994) ("Even assuming . . . a deeply rooted background of aiding and abetting tort liability, it does not follow that Congress intended to apply that kind of liability to the private causes of action in the securities Acts"). In *Stoneridge*, the Court also declined to extend the implied cause of action to the statements by companies that were purchase and supply contractors to the issuer of the securities purchased by the plaintiff because of the risk that it would

infringe upon "areas already governed by functioning and effective state-law guarantees." 552 U.S. at 161. Likewise, in its recent decision of *Morrison v. Nat'l Australia Bank, Ltd.*, the Court declined to extend the reach of section 10(b) to foreign plaintiffs suing foreign and American defendants in connection with securities traded on foreign exchanges. 130 S. Ct. 2869, 2881 & n.5 (2010).

As the Court explained in *Stoneridge*, "[i]n a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." 552 U.S. at 157. This case, however, is not "typical," and because the relevant liability is implied, careful inquiry should also be made into whether the particular circumstances here fit the paradigm for which implied liability even exists. *See Central Bank*, 511 U.S. at 178. As the Court explained in *Blue Chip*, a virtue of its approach in handling implied private causes of action under section 10(b) "is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates." *Blue Chip*, 421 U.S. at 747. First Derivative, of course, cannot lay claim to this kind of defining connection.

To begin with, First Derivative has not bought or sold the securities described in the allegedly misleading prospectuses at issue – namely, those filed in connection with the issuance of securities in the Janus Funds. Pet. App. 59a. Instead, it has purchased stock in the parent company of the investment adviser of those funds, JCG, an entity that is separate and distinct with its own registration statement and disclosure materials. Pet. App. 59a. First Derivative alleges, and Petitioners dispute, that JCM "made" misrepresentations in violation of Rule 10b-5(b) in connection with the securities of the separate Janus Funds, an issue that *amici* offer no view on. Pet. App. 17a-18a. But even if JCM is deemed one of the makers of the statements in the Janus Fund prospectuses, First Derivative never purchased or sold the securities being offered through the prospectuses alleged to have been false or misleading. Pet. App. 60a. As discussed above, the purpose of the mutual fund prospectus is to provide information to *potential investors of the mutual fund* that issues it; the prospectus is not intended to be hijacked by investors of separate and distinct entities in order to facilitate recovery for declines in the value of their separate investments. First Derivative's theory of liability lies outside the scope of a properly framed implied cause of action under section 10(b).

As the Court explained in *Stoneridge*, "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action [because] [i]t ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." 552 U.S. at 159 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)). While the "fraud-on-the-market" theory can generate a presumption of reliance on the part of investors who purchase shares of a misrepresented company, *Stoneridge*, 552 U.S. at 159, "[a] presumption of reliance upon market-price signals is not a presumption of knowledge of all public information," *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1803 (2010) (Scalia, J., concurring), and the presumption should not apply where the alleged misstatements/omissions do not concern the security that the plaintiff purchased.

In considering the reliance inquiry in *Stoneridge*, the Court noted that the "in connection with" requirement of section 10(b) "on a purchase or sale of securities does provide some insight into the deceptive acts that concerned the enacting Congress." 552 U.S. at 160. The requisite reliance is "tied to causation, leading to the inquiry whether respondents' acts were immediate or remote to the injury." *Id.* While the Court acknowledged that the "in connection with" and causation requirements are "analytically dis-

tinct," it considered them "related to each other, and discussion of the first requirement may merge with discussion of the second." *Id.* at 161 (citation omitted). In this case, the causal connection between First Derivative's alleged injury and the alleged misstatements/omissions in the Janus Funds prospectuses is simply too remote to demonstrate legally legitimate reliance on the part of *shareholders of the investment adviser's parent* – particularly in light of the negative consequences such an expansion of the implied private cause of action would entail. *See id.* at 165 ("Concerns with the judicial creation of a private cause of action caution against its expansion.").

As explained above, there have been great strides in recent decades to reform the mutual fund prospectus. These advances have empowered thousands of potential mutual fund investors by providing them with readily accessible information about their potential investments, enabling them more easily to compare and contrast their options. Expanding the judicially created implied private cause of action under section 10(b) to include liability in favor of the adviser's or parent company's stockholders would derail this beneficial trend and jeopardize the integrity of fund prospectus disclosures. Such an expansion of a judicially-created private cause of action is unwarranted.

C. The Expansion of Liability Under Section 10(b) Sought by First Derivative Would Impose Other Improvident Costs.

The fund prospectus disclosure process exists as it does for good reason – it serves the needs of the investors of *mutual funds*. The consequences of permitting the expanded liability First Derivative seeks would distort the carefully balanced prospectus process, at once contravening this Court's prior precedents and undermining decades of efforts to combat "disclosure creep." Moreover, the expansion of liability First Derivative seeks would come with a hefty price tag in the form of other increased costs – "costs that may disserve the goals of fair dealing and efficiency in the securities markets," *Central Bank*, 511 U.S. at 188, and which inevitably must be passed on to the investing public.

First, expanding liability to reach new fact patterns and new classes of litigants runs the risk of injecting securities laws into other markets. *See, e.g., Stoneridge*, 552 U.S. at 161; *Santa Fe Indus. v. Green*, 430 U.S. 462, 478-79 (1977). Second, "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here." *Stoneridge*, 552 U.S. at 164; *see generally* Hon. Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in*

America, 42 DUKE L.J. 945, 946 (1993) ("The international competition for capital is for high stakes. Trillions of dollars are involved. Moreover, the flow of capital among nations is independent of the desires of governments. Capital cannot be captured, hoarded, or reproduced; it must be attracted on a continual basis. The swiftness of modern communication and the sophistication of international securities markets result in instantaneous responses to events affecting the return to investors.").

Third, First Derivative's position would lead "to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Central Bank*, 511 U.S. at 188 (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). In an area that "demands certainty and predictability," *Pinter*, 486 U.S. at 652, a "shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5" fails to provide a "satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Central Bank*, 511 U.S. at 188 (quoting *Blue Chip*, 421 U.S. at 755 and *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1106 (1991) ("The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory . . . that raised such prospects.")). Endorsement of

First Derivative's theory would require any putative "maker" of statements in a securities offering to consider not only the materiality and impact of the statements on the investors to whom the statement is directed but on an uncertain universe of other investors who claim that their investments were affected by a fraud on the market with respect to an entirely distinct security. The resulting uncertainty, particularly with respect to alleged omissions, will impose added costs without the benefit of improving disclosure to the intended audience of investors.

Fourth, in class actions such as this one, if liability is expanded to new fact patterns and new groups of litigants, *see Stoneridge*, 552 U.S. at 163-64, parties subjected to new forms of liability "may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Central Bank*, 511 U.S. at 189. Aside from the threat of damages, the costs of discovery and attorneys' fees can be crippling. *Id.* ("Litigation under 10b-5 thus requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements. *See* 138 Cong. Rec. S12605 (Aug. 12, 1992) (remarks of Sen. Sanford)"). And where, as here, plaintiffs pursue the wrong party on the wrong disclosure materials, companies and their insurers pay the costs of settlement, which then get passed on to shareholders. *See*

Central Bank, 511 U.S. at 189 ("the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors."); *Malack v. BDO Seidman, LLP*, No. 09-4475, 2010 WL 3211088, at *10 (3d Cir. Aug. 16, 2010) ("An increase in frivolous litigation drives up the overall costs of issuing securities, ultimately harming everyone involved. . . ."); *SEC v. Tambone*, 597 F.3d 436, 452-53 (1st Cir. 2010) (Boudin, J., concurring) ("No one sophisticated about markets believes that multiplying liability is free of cost. And the cost, initially borne by those who raise capital or provide audit or other services to companies, gets passed along to the public."); Winter, *supra*, 42 DUKE L.J. at 949-51.

Fifth, expanding liability will mean that parties subjected to new liability will require compensation for bearing the liability risk and will begin to expend more resources painstakingly reviewing statements in order to protect themselves from the risks of litigation. These costs will get passed along to shareholders as well. *See Central Bank*, 511 U.S. at 189.

If this sort of cost-shifting is to occur, it should be Congress that makes the relevant policy choice, not the courts. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007) ("It is the federal lawmaker's prerogative .

. . to allow, disallow, or shape the contours of . . . § 10(b) private actions."). To date, Congress has allowed expansion of liability in the context of Government intervention, but not in the realm of the private cause of action under section 10(b). After this Court held in *Central Bank* that a private plaintiff may not maintain an aiding and abetting suit under section 10(b), 511 U.S. at 191, then-SEC Chairman Arthur Levitt testified before the Senate Securities Subcommittee, citing *Central Bank* and arguing that aiding and abetting liability should be established in private actions brought under section 10(b). *Stoneridge*, 552 U.S. at 158 (citing *Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation: Hearing Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 103d Cong. 13-14 (1994)). Congress declined to take that course, *id.*, instead directing prosecution of aiders and abettors by the SEC in section 104 of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737, 757 (codified at 15 U.S.C. § 78t(e)) ("PSLRA"). *Stoneridge*, 552 U.S. at 158; *Tambone*, 597 F.3d at 445-46 (citing PSLRA § 104) (noting that the SEC "exhorted Congress to extend the same right to private parties," but Congress has declined to do so).

The most recent efforts at introducing such legislation have not been successful.[7] Effecting First Derivative's desired change would thus "undermine Congress's determination that this class of defendants should be pursued by the SEC and not by private litigants." *Stoneridge*, 552 U.S. at 163.

First Derivative's efforts represent yet another attempt to "shoehorn" expanded private

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[7] For example, S.1551, 111th Cong. (2009), represented an effort by Senator Specter to attempt, once again, to amend section 20 of the Act to allow for a private civil action against a person that provides substantial assistance in violation of the Act. The bill has not moved from the Committee since September 17, 2009. *Bill Summary & Status 111th Congress (2009-2010) S. 1551*, LIBRARY OF CONG., http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S1551: (last visited Sept. 10, 2010). More recently, when Congress enacted the Dodd-Frank Act, it once again declined to provide an expanded private right of action. *See Amicus Curiae* Br. of Chamber of Commerce of the United States 11-13 & n.4. Instead, the final Dodd-Frank Act provided that the Comptroller General would perform a study on the costs and benefits of expanding the private right of action under section 10(b). *Id.* at 10 (citing Pub. L. No. 111-203 at § 929A (2010)); *see also* Susan E. Hurd & Elizabeth P. Skola, *Still No Aiding and Abetting Liability Provision*, LAW360.COM (July 28, 2010), http://www.law360.com/print_article/181906 (last visited Sept. 10, 2010) (noting that the results of the study will be submitted to Congress within a year of the passage of the Dodd-Frank Act, and that the President signed the bill into law on July 21, 2010).

liability into a carefully delimited implied cause of action. *See id.* at 162-63. Such an attempt, if successful, would conflict with, among other things, the "deliberate legislative compromise, *see* S. Rep. No. 104-98, at 19 (1995)," that distinguishes the SEC's statutory authority to bring actions against individuals who aided and abetted a section 10(b) violation from the judicially created private remedy under section 10(b). *Tambone*, 597 F.3d at 452 (Boudin, concurring). The compromise struck makes sense because the SEC is better situated to enforce a broader range of liabilities inasmuch as it has no incentive to bring strike suits against well-heeled defendants. If First Derivative's plea for expanded liability became the law, the marked increase in securities class actions with attendant strike suit settlements, the cost of which would inevitably be passed on to shareholders, will not be worth the marginal benefit of expanded liability meager improvement in deterrence beyond that afforded by existing SEC enforcement and criminal punishment. In the end, Congress's particular fact-finding expertise is best suited to balancing the complex economic considerations involved in this case.

CONCLUSION

For the foregoing reasons and the reasons contained in Petitioners' brief, the decision of the court below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CENTER FOR AUDIT QUALITY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Audit Quality ("CAQ") is a public policy organization that seeks to aid investors and the capital markets by advancing constructive suggestions rooted in the audit and accounting profession's core values of integrity, objectivity, honesty, and trust. Any U.S. accounting firm registered with the Public Company Accounting Oversight Board ("PCAOB") may join the CAQ. The CAQ is affiliated with the American Institute of Certified Public Accountants ("AICPA"), and has approximately 750 U.S. public company accounting firms as members, representing tens of thousands of professionals dedicated to audit quality.

The CAQ seeks to improve the reliability of public company audits and to enhance their relevance for investors, particularly in this time of growing financial complexity and globalization. The CAQ is dedicated to helping increase public confidence in the auditing process and to maintaining high standards in the accounting profession. To fulfill its mission, the CAQ offers recommendations to policymakers, issues technical support for public company auditing professionals, and participates in the public discussion

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Petitioners have filed a blanket consent to *amicus* briefs, as reflected on the Court's docket; respondent's written consent to the filing of this brief has been submitted to the Clerk.

about financial reporting. For example, among many other recent activities, the CAQ has filed *amicus* briefs in cases concerning the unconstitutionality of statutory provisions for removal of members of the PCAOB; the confidentiality of documents, communications, and information regarding or relating to a PCAOB inspection; and the distinction between primary and secondary liability under Section 10(b) of the Securities Exchange Act of 1934.

The CAQ has a keen interest in legal rules that affect auditors and the audit process, and the broader impact of such rules on investors and capital markets. This case concerns whether a defendant may be liable under Section 10(b) for statements that are made by and attributed to a company, if the defendant participated in the drafting and dissemination of the statement and if a court infers that "interested investors" would attribute the statement to the defendant. This case is especially important to auditors, because auditors are frequently named as defendants in private securities cases based on allegations that the auditor is liable for the client's statements, even though the statements were not made by or publicly attributed to the auditor.

Every public company must file with the SEC an annual financial statement that has been audited by a certified public accountant. See 15 U.S.C. § 78j-1 (mandating and setting standards for annual audit). These audits are governed by an extensive body of detailed requirements, and typically result in an audit report that contains very specific, public statements by the audit firm. In the case of domestic public companies, the auditor represents that the audit was conducted in accordance with PCAOB standards. If an "unqualified" opinion is warranted, the auditor

represents that the audit provides a reasonable basis on which to opine that the financial statements present fairly, in all material respects, the financial position of the company, the results of its operations, and its cash flows, in conformity with Generally Accepted Accounting Principles ("GAAP").

Investors and courts, however, sometimes mistakenly believe that audit reports are tantamount to assurances that the *company*'s financial statements (1) reflect the only permissible description of the company's financial performance, and (2) are completely accurate. That belief is wrong for two reasons. First, the application of GAAP requires the exercise of professional judgment, and often permits a range of reasonable judgments about how to account for particular transactions. Second, even the most rigorous audit will not examine *every* accounting transaction in the company's records, and may not detect every instance of mistake or fraud. As the Third Circuit has explained, an "audit does not guarantee that a client's accounts and financial statements are correct any more than a sanguine medical diagnosis guarantees well-being; indeed, even an audit conducted in strict accordance with professional standards countenances some degree of calibration for tolerable error which, on occasion, may result in a failure to detect a material omission or misstatement." *In re IKON Office Solutions, Inc.*, 277 F.3d 658, 673 (3d Cir. 2002); see also *Bily* v. *Arthur Young & Co.*, 3 Cal. 4th 370, 379-384 (Cal. 1992) (describing audit standards and process).

For that reason, it is important to protect auditors from liability arising merely from a misleading representation or omission in a company's financial statements, and it is wrong to attribute such a representa-

tion or omission to the auditor. Rather, auditors should be responsible only for *their own* statements. Courts have long held that an auditor's representations in an audit report are "statements" that, if knowingly false, may give rise to liability (if all the other requirements of Section 10(b) are satisfied) in a private securities action. It is through the act of issuing an opinion on the company's financial statements that "the independent auditor assumes a *public* responsibility transcending any employment relationship with the client." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817 (1984). Because of the practical and legal significance of the audit report, the statements contained in such reports are carefully written to state clearly the precise representations that the auditor is making. Auditors should not incur liability for statements other than the statements they have actually made.

In addition to performing audits, auditors perform other important tasks for their public company clients that do *not* involve the issuance of a public statement by the auditor, but may result in a public statement by the company. For example, public companies frequently consult with their auditors to discuss the accounting ramifications of various business decisions. Auditors often attend meetings to discuss business transactions, and respond to telephone inquiries from clients requesting advice on the accounting treatment of business decisions. Such interaction assists the client in understanding how business decisions will affect its financial statements and how to structure transactions. Auditors also provide advice to non-audit clients. A company may seek a second opinion from an accounting firm that is not its audi-

tor if a transaction raises novel or undecided accounting issues.

These consultations are valuable to both the client and shareholders. The client may refrain from entering into a transaction or making a strategic business move if it does not have guidance as to the accounting implications of its decision. Such consultations also reduce the risk that the company's initial accounting treatment of the transaction will be incorrect, and that the company will have to correct its interim unaudited financial statements when it issues its annual, audited financial statements.

Of course, companies are not required to consult with their auditors on every accounting issue. Even when they do consult auditors, the information that they provide to the auditor may be incomplete or inaccurate, whether for innocent reasons (in the usual case) or otherwise (in the rare case of intentional fraud). Auditors also have no control over the myriad public statements that may be made by a company or its executives. For those reasons, investors cannot reasonably assume that statements made by a company or its executives have been vetted and approved by the company's auditor. Vague standards that permit auditor liability based on that assumption, or on an auditor's consultation on accounting matters that are implicated in a misleading statement or omission by the company, would subject auditors to large litigation costs and risks when they have done nothing wrong. Without clear and appropriate liability standards, auditors' legitimate concerns about the enormous costs and risks of class action securities litigation may cause them to curtail their provision of services or to raise the prices they charge, even

though such services benefit investors and conscientious public companies.

The interests of auditors and investors alike will be best served by clear standards delineating the circumstances in which auditors may incur liability in private securities actions under Section 10(b). Investors will benefit from knowing when they may (and may not) rely on an auditor's actual (or assumed) opinion concerning statements made by companies. Auditors will benefit from clear rules that will protect them from liability – and from the costs and risks of meritless class action litigation – for conduct that does *not* violate Section 10(b). The CAQ respectfully submits this *amicus curiae* brief to explain why the Fourth Circuit's decision in this case, and the liability standards advocated by the government, would disserve investors' and auditors' interests.

SUMMARY OF ARGUMENT

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), held that there is no private right of action for aiding and abetting violations of Section 10(b). Liability for aiding and abetting, the Court explained, is inconsistent with the text and structure of the Securities Exchange Act of 1934, as well as with the requirement that private plaintiffs prove reliance on a misleading statement *made by the defendant*. In 1995, Congress authorized the SEC to bring actions against defendants who knowingly aided and abetted violations. In 2010, it authorized SEC actions against reckless aiders and abettors. On both occasions, however, Congress ratified the holding of *Central Bank* by refusing to authorize private suits against secondary actors that merely aided and abetted violations of

Section 10(b) by others. The liability standards adopted by the Fourth Circuit and supported by the government are inconsistent with *Central Bank* and with Congress's responses to that decision.

Central Bank's core holding requires liability standards that draw a clear distinction between a defendant's own statements or omissions and the statements or omissions of others. The Fourth Circuit ignored that distinction by holding that a defendant may be deemed to have made a statement merely by "participating" in the writing or dissemination of a statement made by someone else. The Fourth Circuit's standard is indistinguishable from the definition of aiding and abetting used by lower courts before *Central Bank*. The government, in attempting to defend that standard, emphasizes that petitioners, as investment advisers to the fund that issued the statement, controlled the drafting and dissemination of the fund's statements, much like corporate insiders. But the Fourth Circuit's liability standard draws no distinction between insiders who control the issuance of a statement, and outside professionals such as auditors who do not exercise such control but might be said to have "participated" in the creation of the statement. The government's suggestion that primary liability can arise if a defendant participates "to a sufficient degree" would make it exceedingly difficult for outside professionals to obtain dismissal of a securities complaint if the professional had even the most fleeting involvement in the allegedly misleading statement – the kind of involvement that constitutes, at most, aiding and abetting.

Central Bank, and the requirement that private plaintiffs must prove reasonable reliance on the defendant's statement, also require that plaintiffs suing

outside professionals must prove that a statement was expressly attributed to the defendant. Without such attribution, investors can at most *assume* that the auditor has endorsed a statement made by its client, and reliance based on such an assumption is inherently unreasonable. Unlike corporate executives who control the statements issued by the corporation and whose own words and conduct may be attributed to the corporation as a matter of law, auditors typically do not control a corporation's statements or speak on its behalf. The Fourth Circuit and the government suggest that express attribution should not be required because, in this case, investors would naturally infer that a fund's prospectus bears the imprimatur of the fund's investment adviser. That reasoning has no application to outside professionals such as auditors. Unlike the reliance posited in this case, which is inferred on the theory that investors would perceive no meaningful difference between the speaker and the defendant, investors rely on an audit opinion for the very reason that auditors are impartial and independent from the company. When reliance is predicated on the speaker's independence from the company, reasonable investors cannot and should not merely assume that the company's statement bears the implied and unqualified imprimatur of its independent auditor.

This Court has emphasized the necessity of clear liability standards for securities violations. Standards that permit private suits against auditors only for statements made by and attributed to them will provide certainty and predictability. By contrast, the Fourth Circuit's standards will generate uncertainty and unpredictability. Such vague standards are especially problematic for auditors, who are often the

targets of meritless lawsuits under Section 10(b) merely because they are deep-pocketed defendants.

The aftermath of *Central Bank* vividly confirms the need for clear distinctions between primary violations and aiding and abetting. Securities plaintiffs and the SEC have persistently attempted to evade the holding of *Central Bank* by seeking to expand the definition of primary violations to encompass conduct that is, at most, aiding and abetting. This Court has already rejected the SEC's attempt to expand primary liability under the rubric of "scheme liability," and lower courts have rejected – and harshly criticized – the SEC's theories of primary liability for "using" false statements made by someone else, for making "implied" statements, and (as in this case) for "creating" statements that were actually made by and attributed to someone else. As those decisions have repeatedly emphasized, the liability standards proposed by the SEC would condemn conduct that is merely aiding and abetting, create uncertainty about the bounds of liability, and discourage desirable conduct by auditors and other outside professionals.

The proponents of expansive definitions of primary violations argue that broad liability standards are desirable as a policy matter in order to deter secondary actors from participating in fraudulent activities. Those policy considerations, however, cannot override the congressional judgments reflected in the statute, and overlook many other sanctions that deter outside professionals from aiding deception by their clients. Policy considerations in any event point in the opposite direction. If auditors face potential liability for statements that they have not made and that have not been attributed to them, the substantial cost of defending meritless securities claims will

deter them from providing services that are beneficial to corporations and investors, or prompt them to charge more for doing so. In addition, auditor liability for a statement made by the company but not expressly attributed to the auditor would encourage investors to rely on the incorrect assumption that an auditor must have endorsed *every* statement a company makes, merely because the auditor opines (after completing a rigorous audit) on the company's financial statements, taken as a whole. Investor interests would be best served by emphasizing, rather than obscuring, the difference between statements that have been made by an auditor and those that have not. The broad and nebulous liability standards that the government advocates would disserve the interests of the investing public.

ARGUMENT

In *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court held that there is no implied private right of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). Some lower courts had created such an implied right of action, but this Court held that liability for aiding and abetting was foreclosed by the "text and structure" of the statute. 511 U.S. at 188. That holding rested, in part, on the requirement that private plaintiffs must prove reliance on the defendant's misstatement or omission. If a defendant could be liable merely for aiding and abetting the misstatement or omission of another, "the defendant could be liable without any showing that the plaintiff relied upon *the aider and abettor's* statements or actions." *Id.* at 180 (emphasis added).

The decision in *Central Bank* was controversial in some quarters, and the SEC (among others) urged Congress to create a private cause of action for aiding and abetting. Congress refused. Instead, in Section 104 of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, 757 (1995), it authorized the SEC to prosecute aiders and abettors, but deliberately refrained from extending liability in private actions to parties that did not themselves engage in a primary violation. See 15 U.S.C. § 78t(e). In light of that congressional action, this Court has refused to "revive in substance" liability against aiders and abettors, because doing so "would undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants." *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-163 (2008).

Congress revisited this issue in 2010. Senator Specter proposed legislation to extend liability in private cases to those who "knowingly provide substantial assistance" to violators of Section 10(b). See, *e.g.*, 156 Cong. Rec. S3618-S3619 (daily ed. May 12, 2010); 156 Cong. Rec. S3664-S3665, S3670 (daily ed. May 13, 2010). Again, Congress refused to do so. Instead, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress enhanced the SEC's enforcement powers, so that the SEC (but not private plaintiffs) could bring actions not only against those who "knowingly" provided substantial assistance, but also against those who "recklessly" did so. Pub. L. No. 111-203, § 929O, 124 Stat. 1376, 1862 (2010). The 2010 legislation thus reflected the same congressional determination manifested in the PSLRA – that

this class of defendants should be pursued by the SEC and not by private litigants.

Central Bank did not hold that secondary actors are always free from liability under Section 10(b). The opinion specifically noted that "a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator." 511 U.S. at 191. To establish liability, however, a private plaintiff must prove "*all* of the requirements for primary liability." *Ibid.* Those requirements include "a material misrepresentation or omission by the defendant" and the plaintiff's "reliance upon the misrepresentation or omission." *Stoneridge*, 552 U.S. at 157.

The liability standards adopted by the Fourth Circuit in this case, if applied to outside professionals such as auditors, are inconsistent with both of those requirements.

I. AUDIT FIRMS AND OTHER OUTSIDE PROFESSIONALS MAY COMMIT A PRIMARY VIOLATION ONLY THROUGH THEIR OWN STATEMENTS AND OMISSIONS, NOT THROUGH THE STATEMENTS AND OMISSIONS OF THEIR CLIENTS

The core holding of *Central Bank* – that private plaintiffs may not recover from defendants that aided and abetted a violation, but did not themselves commit a violation – requires liability standards that draw a clear distinction between a defendant's own statements and the statements of others. As the Second Circuit has explained, "if *Central Bank* is to have any real meaning, a defendant must actually make a

false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b)." *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) (quotation marks and citation omitted).

The Fourth Circuit acknowledged that respondent's securities fraud claim requires proof of a material misrepresentation or omission "'*by* the defendant.'" *First Derivative Traders* v. *Janus Capital Group Inc. (In re Mutual Funds Inv. Litig.)*, 566 F.3d 111, 121 (4th Cir. 2009) (quoting *Stoneridge*, 552 U.S. at 157). It held, though, that this element had been sufficiently pleaded because the "essence of plaintiffs' complaint" is that petitioners "helped draft the misleading prospectuses" and, "by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Ibid.* The government defends this standard. In its *amicus* brief urging that certiorari be denied, it asserts that primary liability may arise if a defendant "has participated to a sufficient degree in the drafting or dissemination of misleading statements" or if a defendant, "acting alone or with others, creates a misrepresentation." U.S. Inv. Br. 11.

This elastic definition of "making" a statement cannot be reconciled with *Central Bank*. Indeed, the definition is virtually indistinguishable from pre-*Central Bank* definitions of aiding and abetting. According to Judge Learned Hand's influential formulation, criminal aiding and abetting requires that the defendant must "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his ac-

tion to make it succeed." *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

Aiding-and-abetting violations of Section 10(b), as conceived by lower courts before *Central Bank*, involved "knowledge" of a primary violation and "substantial assistance" in achieving the primary violation. See Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 662 (1988). "Substantial assistance" could take many forms, including aiding in the preparation of misstatements or executing transactions on behalf of the principal. See, *e.g.*, *id.* at 701-739; *Cumis Ins. Society, Inc.* v. *E.F. Hutton & Co.*, 457 F. Supp. 1380, 1386 (S.D.N.Y. 1978). Indeed, the assistance element of aiding and abetting was described as requiring that the defendant "substantially participated in the wrongdoing." *Gilmore* v. *Berg*, 761 F. Supp. 358, 373 (D.N.J. 1991). To say, in the words the Fourth Circuit used in the present case, that the defendant "helped draft" and "participat[ed] in the writing and dissemination of the prospectuses" (566 F.3d at 121) is to say merely that the defendant aided and abetted.

By reviving in substance liability for aiding and abetting, the Fourth Circuit's endorsement of liability for "participating" in the "creation" of a statement – when the defendant does not actually make a statement of its own – would greatly expand the opportunities for private plaintiffs to bring meritless cases against auditors and other outside professionals, and would make it exceedingly difficult for such defendants to obtain dismissal of those cases before trial. Public companies are likely to seek advice from outside professionals on any difficult accounting or legal issue that may be material to the company's financial

condition, and class action plaintiffs are virtually certain to allege that, by providing such advice, the outside professionals "participated" in the drafting or dissemination of any statement the company made after receiving such advice.

In urging denial of certiorari, the government attempted to justify this liability standard by emphasizing the ways in which petitioner JCM, as an investment adviser, is "materially unlike outside service providers such as law firms and accounting firms." U.S. Inv. Br. 22 n.10. The government emphasizes that a mutual fund's investment adviser typically creates the fund (*id.* at 10), manages it (*id.* at 8, 9, 10, 12, 13, 16, 18), and controls it (*id.* at 9, 10, 12, 13, 16). An investment manager "typically exercises control over the fund that is at least equivalent to that exercised by internal management in other corporations" (*id.* at 16), and petitioner JCM "controlled the drafting and dissemination of the misleading prospectuses as one aspect of its general control over the Funds' affairs" (*id.* at 12). For those reasons, the government argues, cases involving outside professional advisers such as auditing firms have little bearing on this case. See *id.* at 8, 9, 12, 18, 19, 20, 21, 22 n.10.

Unfortunately, the liability standards endorsed by the government reach far beyond the narrow justification that is offered to support them. The government argues that "a defendant" – evidently *any* defendant – that has "participated" in the "drafting or dissemination" of misleading statements can be liable for a primary violation. U.S. Inv. Br. 11. The government offers its assurance that "not *every* form of assistance to an unlawful securities fraud will constitute a primary violation." *Id.* at 13. But the govern-

ment provides only one limiting principle to distinguish between primary liability and aiding and abetting. Primary liability, the government unhelpfully explains, arises only if the defendant has "participated *to a sufficient degree*." *Id.* at 11 (emphasis added).

Nebulous concepts such as "participating" to a "sufficient" degree in the "drafting" or "dissemination" of a statement provide no meaningful guidance to fact finders who must ultimately decide whether a violation has occurred. As a practical matter, making liability turn on such imprecise standards would make it exceedingly difficult for any outside professional to obtain dismissal of a securities complaint if the professional had even the most fleeting and tangential involvement in the allegedly misleading statement. Even if the government is correct that the defendant in this case controlled both the drafting of the statement and the fund's decision to issue the statement, the "participation" standard as articulated by the government and the Fourth Circuit contains no explicit limitation that would restrict its application to cases like this one. Without such limitations, the standard would expand liability far beyond the narrow circumstances presented here, and would encompass conduct that is, at most, aiding and abetting.

II. INVESTORS CANNOT REASONABLY RELY ON THE IMPLIED IMPRIMATUR OF AUDITORS AND OTHER OUTSIDE PROFESSIONALS BASED ON STATEMENTS THAT HAVE NOT BEEN EXPRESSLY ATTRIBUTED TO THOSE PROFESSIONALS

Central Bank, and the requirement that private plaintiffs must prove reasonable reliance on the defendant's misleading statement or omission, also require, by logical implication, that private plaintiffs suing outside professionals must prove not merely a statement *by* those professionals, but explicit public attribution of the statement *to* them. The Fourth Circuit acknowledged that plaintiffs could not establish reliance unless the misleading statements were attributed to the defendants. It held, however, that *actual* attribution was unnecessary, and that a plaintiff could sufficiently allege reliance by alleging facts from which a court, "on a case-by-case basis," could plausibly infer that "interested investors (and therefore the market at large) would attribute the allegedly misleading statement to the defendant." 566 F.3d at 124. Such allegations are sufficient, according to the Fourth Circuit, "even if the statement on its face is not directly attributed to the defendant." *Ibid.* The government agrees with the Fourth Circuit that such allegations are sufficient, but argues that they are not always necessary. According to the government, there is no "categorical requirement that the alleged false statement must have been attributed to the defendant when it was issued." U.S. Inv. Br. 15.

The Fourth Circuit's standard of imputed attribution makes no sense when applied to outside professionals such as auditors. Investors cannot reasonably rely on an independent professional's supposed imprimatur based on a public statement that is neither made by nor attributed to the independent professional. Without attribution of such a statement to an outside professional, investors have no way to know whether the outside professional has *in fact* endorsed the statement, what kind of assurance (if any) the professional intended to provide, what procedures (if any) the professional employed to form an opinion, or even whether the professional had the slightest knowledge of, or involvement in, the statement's substance or issuance. The Second and Eleventh Circuits have held that such attribution is required in private suits against outside professionals, and the First and Tenth Circuits have favorably discussed that requirement in *dicta*. *PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *SEC* v. *Tambone*, 597 F.3d 436, 447 (1st Cir. 2010) (en banc); *SEC* v. *Wolfson*, 539 F.3d 1249, 1258-1260 (10th Cir. 2008).

The government's position with respect to attribution, like the Fourth Circuit's, also fails to account for the distinct roles of outside professional advisers. The government argues that attribution should not be required because, in *this* case, "[t]here is no reason to suppose that the investing public's willingness to rely on [the Fund's] statements would have depended on whether the public attributed those statements to JCM or solely to the Funds' own employees." U.S. Inv. Br. 16. Because an investment adviser typically manages and controls the fund, "investors would

naturally infer that statements in a fund's prospectus bear the imprimatur of the fund's manager." *Ibid.*

That rationale could not be more mistaken when applied to outside professionals like auditors. Auditors provide many services – for example, providing advice on the appropriate accounting treatment of business transactions, and providing opinions to non-audit clients – that typically do not result in public statements that are made by or attributed to the auditor. To the extent that public statements are made in connection with such matters, the statements are made by the corporate client or by its executives, who control the statements that are made by the corporation, and whose own words and conduct may be attributed to their corporation as a matter of law. Unlike those corporate insiders, auditors do not control the statements made by a corporation or its executives, and typically do not speak on their behalf. It is precisely because audit reports are publicly attributed to their authors (rather than the company), and because those authors are *independent* of their clients, that investors choose to rely on the representations made. As the government itself recognizes, investors "'are more likely to credit the accuracy of' an issuer's statements when those statements have been given the 'imprimatur' of a 'supposedly impartial assessment' by 'a well-known national law or accounting firm.'" U.S. Inv. Br. 20 (quoting *PIMCO*, 603 F.3d at 156).

When it is the fact of the defendant's independence from a company that induces investor reliance, a statement by the company that has not been expressly attributed to the defendant provides no basis for reliance. Attributing an unspoken imprimatur to an independent auditor is inherently unreasonable.

See *PIMCO*, 603 F.3d at 156 ("Without explicit attribution * * * reliance on that firm's participation can only be shown through 'an indirect chain * * * too remote for liability.'") (quoting *Stoneridge*, 552 U.S. at 159). Auditors are – and should be – responsible for their own statements. If a statement has not been expressly attributed to an auditor, however, investors cannot reasonably rely on an assumption that the statement has been approved or endorsed by the auditor.

The government opposes an express attribution rule in this particular case because it views the fund, in essence, as the alter ego of its investment adviser. But the government apparently would eschew an express-attribution requirement even in those cases where reliance is predicated not on the theory that the defendant and the issuer are one and the same, but on the theory that the defendant is an impartial and independent entity deserving credence for that very reason. The Fourth Circuit, too, emphasized JCM's control over the fund that issued the misleading prospectus in holding that express attribution is unnecessary, but its liability standard draws no distinction between corporate insiders and professional advisers whose very independence is the foundation of investor reliance. Indeed, the Fourth Circuit's discussion of attribution relies largely on cases against auditors and other outside professionals. For such defendants, there can be no reasonable reliance in the absence of express attribution.

III. CLEAR LIABILITY STANDARDS ARE ESSENTIAL TO PROTECT OUTSIDE PROFESSIONALS AGAINST UNWARRANTED, BUT PERSISTENT, EFFORTS TO EXPAND THE SCOPE OF PRIMARY LIABILITY

This Court has emphasized that the scope of liability of Section 10(b) "demands certainty and predictability." *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988). "'[A] shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Central Bank*, 511 U.S. at 188 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975)).

Certainty and predictability are provided by straightforward rules that outside professionals cannot be liable for damages in private securities cases unless they actually make a misleading statement or omission themselves, and that investors cannot reasonably rely on an implied imprimatur of outside professionals if no public statement has been expressly attributed to them. When auditors issue an audit report, they state precisely which of the company's statements they are opining on, the level of assurance that the opinion provides, and the limitations of that opinion. In contrast, a standard that subjects outside professionals to liability for "participating" to a "sufficient" degree in formulating a misleading statement that is actually made by someone else, or one that requires courts to speculate on a case by case basis whether "interested investors" relied upon the im-

plied imprimatur of independent professionals, even though no misleading statement or omission has been attributed to those professionals, guarantees *un*certainty and *un*predictability. If the latter standards require something more than aiding and abetting, the government and the Fourth Circuit are extraordinarily vague about what that might be.

Clear liability rules are especially important for auditors because auditors are frequently targeted as defendants in securities class actions for reasons unrelated to the merits of those cases. Auditing firms provide "deep pocket" targets for investors trying to recoup their losses. The company that actually made the deceptive statement is often bankrupt or otherwise unable to afford a substantial settlement payment, making it a less attractive target for class action plaintiffs and their counsel. Therefore, even if the auditor played only a secondary role – reviewing (but not auditing and opining on) allegedly misleading financial statements, or merely answering an accounting question in a brief telephone call – the auditor may be the prime target of class action plaintiffs.

The need for clear liability standards is also reinforced by the aftermath of this Court's decision in *Central Bank*. That decision should have confirmed beyond any doubt that secondary actors cannot be sued by private plaintiffs because of statements that were neither made by nor attributed to the defendants. Instead, the class action bar and other proponents of secondary liability, including the SEC, responded by putting old wine into new bottles, persistently urging the lower courts to impose liability for conduct that is aiding and abetting (at most) by redefining the scope of primary liability to encompass such conduct.

For example, in *Simpson* v. *AOL Time Warner Inc.*, 452 F.3d 1040 (9th Cir. 2006), plaintiffs alleged that defendants had entered into sham business transactions with Homestore, in order to create the illusion of revenue. As *amicus curiae*, the SEC supported the theory that Homestore's business partners were primary violators of Section 10(b), because they had entered into a "scheme to defraud" investors. See Brief for SEC as *Amicus Curiae*, *Simpson* v. *Homestore.com, Inc.*, No. 04-55665, 2004 WL 5469571 (9th Cir. Oct. 2004). The Ninth Circuit adopted the SEC's position. *Simpson*, 452 F.3d at 1048.

This Court then granted certiorari in *Stoneridge*, a case presenting the same issue as *Simpson*, and, just as it had in *Central Bank*, rejected the concept of broad liability for secondary actors.[2] *Stoneridge* rejected the theory that defendants who allegedly enabled an issuer's misleading statements – but who did not themselves actually make any public statement – are primary violators. "Were we to adopt [the suggested] construction of § 10(b), it would revive in substance the implied cause of action against all aiders and abettors except those who committed no deceptive act in the process of facilitating the fraud." 552 U.S. at 162-163. That result, this Court concluded, would be inconsistent with the congressional decision that only the SEC may bring an action against aiders and abettors (*id.* at 163), and would

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[2] In this Court, the Solicitor General stated that the SEC's *amicus* brief in *Simpson* was "inconsistent with *Central Bank*" and "does not reflect the views of the United States." Brief for the United States as *Amicus Curiae*, *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, No. 06-43, 2007 WL 2329639, at *23 n.13 (August 15, 2007).

allow plaintiffs with weak claims to extort settlements from innocent companies (*ibid.*).

In *Tambone*, the SEC advanced a different theory for expanding the scope of primary liability. It argued that liability could arise from a defendant's "use" of a false statement to sell securities, even if the statement was crafted entirely by someone else, or from the defendant's "implied" statement of belief that representations in a prospectus are truthful and complete. 597 F.3d at 442. The First Circuit, *en banc*, emphatically rejected that theory. It described the theory as an attempt "to impose primary liability on the defendants for conduct that constitutes, at most, aiding and abetting." *Id.* at 446.

Judge Boudin's concurring opinion was more blunt. The SEC's position was "alarmingly ambitious." 597 F.3d at 450. It had "no obvious stopping point: virtually anyone involved in the underwriting process might under the SEC's 'making a statement' theory be charged and subject to liability in a suit under section 10(b)." *Id.* at 452. "The argument against so sweeping a position begins with [the] language [of Rule 10b-5], but it does not end there: congressional policy, Supreme Court precedent, practical consequences and the nearly uniform view of circuit courts that have spoken all argue against the SEC's proposed interpretation." *Id.* at 451. "No one sophisticated about markets believes that multiplying liability is free of cost. And the cost, initially borne by those who raise capital or provide audit or other services to companies, gets passed along to the public." *Id.* at 452-453.

In *PIMCO*, the SEC tried again to expand the scope of primary liability, notwithstanding *Central*

Bank. The Second Circuit's previous decisions in *Wright* and *Lattanzio* required both (1) that a defendant make an *actual* statement, *and* (2) that the statement be attributed to the defendant. *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 174 (2d Cir. 1998); *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 153 (2d Cir. 2007). Disregarding that circuit precedent, the SEC argued that a defendant commits a primary violation "'if he provides the false or misleading information that another person then puts into the statement'" – even if the defendant himself made no statement at all, and even if the false or misleading statement is never attributed to him. 603 F.3d at 151 (quoting Brief for SEC as *Amicus Curiae* at 7).

The Second Circuit rejected that "creator" standard, for reasons that are by now familiar. "A creator standard establishes no clear boundary between primary violators and aiders and abettors, and it is uncertain what level of involvement might expose an individual to liability." 603 F.3d at 157. The creator standard would lead to "protracted litigation and discovery aimed at learning the identity of each person or entity that had some connection, however tenuous, to the creation of an allegedly false statement." *Ibid.* And it "would inevitably lead to uncertainty regarding the scope of Rule 10b-5 liability and potentially deter beneficial conduct." *Ibid.* The Second Circuit therefore reaffirmed that secondary actors such as auditors "cannot incur primary liability * * * for a statement not attributed to that actor at the time of

its dissemination." *Id.* at 158 (quoting *Wright*, 152 F.3d at 175).[3]

Given this history, and class action plaintiffs' continuing efforts to recover their investment losses from outside professionals, even when no misleading statement or omission was made by or attributed to those professionals, this Court should state clearly that such professionals can be sued for primary violations only for their own statements, and that investors' claims of reliance may not rest merely on the assumption that outside professionals have given some implied and undefined imprimatur to statements that have not been expressly attributed to them.

IV. EXPANDING THE SCOPE OF PRIMARY LIABILITY FOR OUTSIDE PROFESSIONALS WILL BE HARMFUL TO INVESTORS

The principle that outside professionals may incur private liability only for a material misstatement or omission that is made by and attributed to them is opposed by some (including the SEC) on policy grounds, for the same reason they have advocated private liability for aiding and abetting. They argue that a more expansive definition of primary violations "deters secondary actors from contributing to fraudulent activities and ensures that defrauded plaintiffs are made whole." *Central Bank*, 511 U.S. at 188. The CAQ shares those goals, but worthy goals do not ensure sound liability standards. In the CAQ's view, the policy arguments advanced by the proponents of

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[3] The Second Circuit explicitly refrained from deciding whether attribution is required for claims against corporate insiders. 603 F.3d at 158 n.6.

broader liability for secondary actors are misguided for multiple reasons.

First, of course, "[p]olicy considerations cannot override" the congressional judgment that is reflected in the "text and structure" of the statute, including the congressional determination that only the SEC, but not private plaintiffs, may sue aiders and abettors. *Central Bank*, 511 U.S. at 188.

Second, there are ample means, wholly apart from private suits under Section 10(b), to deter outside professionals from helping their clients engage in deceptive activities and to punish them if they do. In *Stoneridge*, 552 U.S. at 166, this Court identified some of those potential sanctions:

> Secondary actors are subject to criminal penalties, see, *e.g.*, 15 U.S.C. § 78ff, and civil enforcement by the SEC, see, *e.g.*, § 78t(e). * * * In addition some state securities laws permit state authorities to seek fines and restitution from aiders and abettors. * * * The securities statutes provide an express private right of action against accountants and underwriters in certain circumstances, see, 15 U.S.C. § 77k.

In addition, the PCAOB and fifty state boards of accountancy exercise ongoing oversight of auditors.

Third, liability untethered from any requirement that the auditor actually must make a statement, and that the statement must be attributed to the auditor, would be unfair to auditors and, ultimately, harmful to investors.

A regime that leaves auditors at risk of massive liability for statements made by their clients will inevitably influence the ability and the willingness of

auditors to provide services that are beneficial to companies and their shareholders. In the years immediately preceding passage of the PSLRA, rampant class action litigation made accounting firms increasingly unwilling to perform audits for clients perceived as risky, such as companies in financial distress, smaller or less-well-established companies (including startups), and companies operating in volatile industries. See Frederick L. Jones & K. Raghunandan, *Client Risk and Recent Changes in the Market for Audit Services*, 17 J. ACCT. & PUB. POL'Y 169, 179 (1998). Even when audit firms are willing to provide such services, the costs of securities litigation may be passed on to their clients, and indirectly to their clients' investors. See Jamie Pratt & James Stice, *The Effect of Client Characteristics on Auditor Litigation Risk Judgments, Required Audit Evidence, and Recommended Fees*, 69 ACCT. REV. 639, 655 (1994). This Court described those adverse effects of expansive liability rules in *Central Bank*. See 511 U.S. at 189. It did so again in *Stoneridge*. 552 U.S. at 163-164.

Investor interests are served by clear attribution rules for other reasons, as well. Investors whose valuation of securities may be influenced by the opinions of an independent auditor should understand that they rely at their peril on the mere *assumption* that "statements" have the implied imprimatur of an auditor, if no statement has been expressly attributed to the auditor. Courts should not lend credence to *incorrect* investor assumptions that an auditor must have endorsed *every* statement a company makes, merely because the auditor (after completion of a rigorous audit) opines on the company's annual financial statements, taken as a whole.

Expansive liability for auditors, based on misleading statements made by others and lacking any attribution to or endorsement by the auditor, would not promote the cause of more reliable financial reporting and would not serve the interests of investors. Auditors can and do make their own statements, and stand behind them. Those statements are explicit, precise, and appropriately qualified. Auditors should not be liable for statements they have not made, based on judicial inferences that "interested investors" would attribute to the auditor an undefined and unqualified imprimatur for someone else's statement. Investors are best served by bright-line standards that will emphasize, rather than obscure, the difference between those statements that *have*, and those statements that *have not*, been made by an auditor.

CONCLUSION

The Court should make clear that, to commit a violation of Section 10(b), secondary actors such as auditors must actually make a statement, and the statement must be attributed to them.

Respectfully submitted.

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Supreme Court of the United States

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JANUS CAPITAL MANAGEMENT, LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, such as cases involving the federal securities laws, including *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), and *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Pursuant to Rule 37.3, *amicus curiae* states that petitioner and respondent have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

The Fourth Circuit, in its decision below, held that a service provider who participates in drafting or supervising an allegedly misleading statement could be liable under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and SEC Rule 10b-5(b), 17 C.F.R. § 240.10b-5, if investors "would attribute to the [service provider] *a substantial role in preparing or approving the allegedly misleading statement*" — a determination that would have to made on "*a case-by-case basis.*" Pet. App. at 24a (emphasis added). The Fourth Circuit also held that a service provider could be deemed to have "made" a false statement based on its "participat[ion] in the writing and dissemination" of the statement, even though the statement was not publicly attributed to the service provider. *Id.* at 18a.

The Fourth Circuit's decision blurs the distinction between secondary actors who participate behind the scenes in preparing or approving statements and primary actors — typically issuers and certain of their corporate officers — to whom such statements are publicly attributed. This decision contradicts the holding of *Stoneridge* because it would significantly extend the implied private right of action under §10(b) and Rule 10b-5(b) to reach whole categories of defendants — lawyers, accountants, investment bankers, and other service providers — who have traditionally been deemed to be at most aiders and abettors, not primary violators.

Moreover, extending primary liability under §10(b) would put U.S. businesses at a significant

competitive disadvantage as issuers would have to indemnify these new classes of defendants against class action litigation costs. It would thereby increase the cost of raising capital on U.S. exchanges, thus discouraging businesses from raising capital in the U.S. This would diminish capital raising when our economy is most in need of that. And it would impede efforts to maintain the U.S. as the leading global financial center in increasingly competitive markets.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and again in *Stoneridge*, the Court limited the scope of implied private action liability under §10(b). Both times, the Court declined to extend the implied right of action and subject secondary actors to amorphous and ill-defined theories of §10(b) liability. In contravention of *Central Bank* and *Stoneridge*, the Fourth Circuit's decision does exactly that. The Fourth Circuit's test extends §10(b) liability to anyone who "substantially" participates in drafting, preparing, or approving a misstatement even if the misstatement is publicly attributed to someone else. This expands the §10(b) implied private right of action to secondary actors in a way that this Court has repeatedly declined to do. By requiring lower courts to conduct a fact-intensive, "case-by-case" determination as to whether a given secondary actor's participation is "substantial" enough to warrant a

finding of primary liability, the Fourth Circuit's test would guarantee inconsistency in its application and outcome and foster uncertainty and unpredictability that would injure our financial markets.

The Court should reject this expansion in favor of a bright line rule, such as that adopted by the majority of federal appellate courts, which makes clear to all market participants that "those who sign or otherwise allow a statement to be attributed to them expose themselves to liability," while those who do not sign "are beyond the reach of Rule 10b-5's private right of action." *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010). A bright line rule is easier for district courts to apply, avoids protracted litigation, and avoids "discovery aimed at learning the identity of each person or entity that had some connection, however tenuous, to the creation of an allegedly false statement." *Id.* at 157.

1. The Court should reject the test adopted by the Fourth Circuit and decline to expand the implied right of action under §10(b) for numerous reasons.

First, *Stoneridge* held that the implied right of action should not be extended by the Court beyond "its present boundaries" as of 1995 when the Private Securities Litigation Reform Act of 1995 (the "PSLRA") was enacted. *Stoneridge*, 552 U.S. at 165. Those boundaries did not include implied private liability for those who participated in drafting false and misleading statements. The implied right of

action under §10(b) should not be extended when Congress declined to do so in 1995 and again in 2010. *Second*, extending the §10(b) implied right of action to cover those who merely participate in drafting or approving a misstatement is incompatible with the element of defendant-by-defendant reliance required by *Central Bank* and *Stoneridge*. *Third*, such an extension of implied private §10(b) liability is also incompatible with the defendant-by-defendant loss causation expressly required by the PSLRA. *Fourth*, the expansion proposed by the Fourth Circuit would inject considerable uncertainty into an area of the law where predictability and certainty are needed. And *fifth*, the Fourth Circuit's expansion, by extending class action liability to categories of financial market participants, such as accountants, lawyers, and investment bankers, who have traditionally been treated as at most aiders and abettors, would raise the cost of raising capital on domestic exchanges and deter issuers from listing their securities in the United States.

2. Independently, the Court should also reject the Fourth Circuit's holding that one who participates in drafting or disseminating a false statement can be deemed to have "made" the statement for numerous reasons.

First, the Fourth Circuit's holding cannot be squared with the text of Rule 10(b)-5(b), which limits liability to those who "make" a false or misleading statement or omission. *Second*, the Fourth Circuit's

decision includes within the "maker" category those who merely "participate" in drafting or disseminating another's false statement, thereby extending the private right of action to aiders and abettors in contravention of *Central Bank*. *Third*, the Fourth Circuit's decision contravenes settled law that one who does not speak cannot be liable under §10(b) absent a duty to speak. And *fourth*, the Fourth Circuit's decision would impose liability not just on those who "make," but on those who "cause to be made" false or misleading statements. Congress knew how to reach this broader group of defendants when it wished to do so. This is evidenced by §18(a) of the 1934 Act, which provides an express cause of action if, but only if, a plaintiff actually relies on a defendant who "shall make or cause to be made" a false or misleading statement in any report or document filed pursuant to the 1934 Act. 15 U.S.C. §78r. The SEC did not include "cause to be made" language in Rule 10b-5(b), and the courts should not rewrite the Rule to add it.

ARGUMENT

I. PRIMARY LIABILITY UNDER §10(b) SHOULD NOT BE EXPANDED TO SECONDARY ACTORS TO WHOM NO FALSE OR MISLEADING STATEMENTS ARE PUBLICLY ATTRIBUTED.

A. The Court Should Defer To Congress' Decision Not To Expand Primary Liability To Secondary Actors To Whom No False Or Misleading Statements Are Publicly Attributed.

The private right of action under §10(b) and Rule 10b-5 is a "judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge*, 552 U.S. at 164 (citation omitted); *see also Lampf, Pleva, Lipkin, Prupis & Pettigrow v. Gilbertson*, 501 U.S. 350, 359 (1991) ("[W]e have made no pretense that it was Congress' design to provide the remedy afforded."). As this Court held in *Stoneridge*, "[t]he decision to extend the implied cause of action is for Congress," not for the courts. 552 U.S. at 165; *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) ("[T]he breadth of the [implied private] right once *recognized should not, as a general matter, grow beyond the scope congressionally intended*.") (emphasis added).[2]

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[2] *Cf.* 501 U.S. at 1110 (Scalia, J., concurring) ("[When] the federal cause of action at issue here was never enacted by

Accordingly, *Stoneridge* held that the implied private right of action under §10(b) should not be extended by the courts beyond the "boundaries" in place when the PSLRA was enacted in 1995. 552 U.S. at 165-66. "The decision to extend the cause of action is for Congress, not for us. . . . It is appropriate for us to assume that when [the PSLRA] was enacted, Congress accepted the §10(b) private cause of action as then defined but chose to extend it no further."[3] *Id.*

Stoneridge illustrates the Court's general approach not to extend implied private rights of action. The Court has consistently declined to extend existing implied rights of action. *See, e.g., Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (no private *Bivens* action against Bureau of Land Management

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Congress . . . the more narrow we make it (within the bounds of rationality) the more faithful we are to our task.") (citation omitted).

[3] The *stare decisis* effect of *Stoneridge* extends to its rationale, and not merely to its narrow result. *See Carey v. Musladin*, 549 U.S. 70, 79 (2006) (*stare decisis* includes "explanatory language" for the Court's ruling even if "such guidance . . . may not have been strictly necessary as an explanation of the Court's specific holding"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also the portions of the opinion necessary to that result by which we are bound."); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

employees alleged to have used harassment and intimidation in attempt to force owner to grant easement); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287-91 (2002) (no private right of action created by nondisclosure provisions in Family Educational Rights and Privacy Act); *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (no private right of action to enforce disparate-impact regulations promulgated under Title VI of Civil Rights Act of 1964).

When the PSLRA was enacted, the §10(b) implied private right of action had not been extended to those who merely participate in drafting an alleged misstatement. *See Central Bank*, 511 U.S. at 177 ("[T]he statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act."); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) ("Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms . . . all fall within the prohibitive bar of *Central Bank*."). Under *Stoneridge*, that should be the end of the matter.

Moreover, any extension of the implied private right of action to those who participate in drafting would interfere with the "deliberate congressional choice" — at least twice — to "impose some forms of secondary liability, but not others" under the federal securities laws. *Central Bank*, 511 U.S. at 184. In 1994, Congress was urged to overturn *Central Bank* and extend the §10(b) private right of action. *See, e.g., Abandonment of the Private Right of Action for*

Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation: Hearing before the Subcomm. on Secs. of the S. Comm. on Banking, Hous. & Urban Affairs, 103d Cong. 14 (1994) (statement of Arthur Levitt, Chairman, SEC) ("Legislation is also needed to restore aiding and abetting liability in private actions which are a necessary supplement to [the SEC's] overall enforcement program."). In particular, then-SEC Chairman Levitt urged Congress to extend §10(b) private damages liability to defendants who "act behind the scenes and do not themselves make statements." *Securities Litigation Reform: Hearings before the Subcomm. on Telecomms. & Fin. of H. Comm. on Energy and Commerce*, 103d Cong. 35 (1994) (testimony of Arthur Levitt, Chairman, SEC). However, Congress declined to extend the boundaries of the §10(b) action because doing so "would be contrary to [the PSLRA's] goal of reducing meritless securities litigation." S. Rep. No. 104-98, at 19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 698.

In *Stoneridge*, the Court deferred to Congress' determination, recognizing that, when the PSLRA was enacted, "Congress accepted the §10(b) private cause of action *as then defined but chose to extend it no further*." 522 U.S. at 166 (emphasis added). The Court held that, in light of concerns with the expansion of judge-made implied rights of action, "the §10(b) private right [of action] should not be extended beyond its present boundaries." *Id.* at 165. *Stoneridge* properly has been understood to stand for

the proposition that "§10(b) liability should remain narrow and limited to its current contours." *Malack v. BDO Seidman, LLP*, No. 09-4475, 2010 WL 3211088, at *9 (3d Cir. Aug. 16, 2010).

Stoneridge's rationale of not extending the §10(b) implied right of action is even sounder today. This is because recently, when Congress enacted the Dodd-Frank Act, it declined to overturn *Central Bank* and *Stoneridge* and provide an expanded private right of action. Congress was repeatedly urged to do so. *See, e.g., Evaluating S. 1551: The Liability for Aiding and Abetting Securities Violations Act of 2009: Hearings Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary,* 111th Cong. 2 (2009) (statement of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Univ. School of Law) ("[T]he Federal Securities laws . . . since 1994, do not permit the victim [of securities fraud] to sue the aider and abetter [sic] even if there is conscious, knowing assistance given to the primary violation. Now, it is time to reevaluate that."). An early draft of the Senate bill contained a provision that would have extended §10(b) liability to those who "provide substantial assistance" to another person in violation of the Exchange Act. S. ___, 111th Cong. §984 (draft dated Nov. 19, 2009). That provision was not included in the bill presented to the full Senate on April 10, 2010. S.3217, 111th Cong. (draft dated Apr. 15, 2010). On May 3, 2010, during the Senate floor debate on the bill, Senator Arlen Specter submitted amendment SA 3776 which would have explicitly

overturned *Stoneridge and Central Bank*.[4] That amendment was withdrawn on May 20, 2010, (111 CONG. REC. 4077 (2010)), however, and was not included in the Senate's final version of the bill.

Following Senate passage of the bill, the House-Senate conference considered yet another proposed amendment that would have included a private right of action against those who substantially assist a §10(b) violation. Susan E. Hurd & Elizabeth P. Skola, *Still No Aiding and Abetting Liability Provision*, LAW360 (July 28, 2010), http://www.law360.com/print_article/181906. That amendment was rejected, however. *Id.* Instead, the 848-page final Act contains a provision that requires the Comptroller General to perform a study, to be

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[4] Specifically, the amendment would, in part, have included the following language in the financial reform bill:

> For purposes of any private civil action implied under this title, any person that knowingly provides substantial assistance to another person in violation of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of this title to the same extent as the person to whom such assistance is provided. For purposes of this paragraph, a person acts knowingly only if the person has actual knowledge of the conduct underlying the violation described in the preceding sentence.

111 CONG. REC. 3047-48 (2010).

submitted to Congress within one year of the enactment of the Act, on the costs and benefits of expanding the private right of action under §10(b). Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 at §929Z (2010).[5]

Congress is presumed to know the law when it legislates. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982). Thus, when the Dodd-Frank Act was promulgated, Congress knew from *Stoneridge* that federal courts would not expand §10(b) liability beyond its boundaries at the time of the PSLRA. *See supra*, at 9-11. Congress' repeated decisions not to expand §10(b) private liability should be dispositive because "[i]t is the federal lawmaker's prerogative . . . to . . . shape the contours of . . . §10(b) private actions." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310-11 (2007). Expanding §10(b) liability by judicial fiat to cover those who assist behind the scenes with preparing or approving another's false statement would do what Congress chose *not* to do — overrule *Stoneridge*. The Court should again decline to extend implied §10(b) private liability by judicial action where Congress has repeatedly declined to do so.

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[5] As explained *infra*, at 24-27, the Chamber believes that such an expansion's costs far exceed any benefits and would harm the competitiveness of U.S. markets.

B. Expanding Primary Liability To Secondary Actors To Whom No Misstatements Are Publicly Attributed Is Incompatible With The Defendant-by-Defendant Reliance Required By *Central Bank* and *Stoneridge*.

The §10(b) private right of action requires plaintiffs to establish reliance on a defendant-by-defendant basis. *See Stoneridge*, 552 U.S. at 159 ("Reliance by the plaintiff on the *defendant's* deceptive acts is an essential element of the §10(b) private cause of action.") (emphasis added); *Central Bank*, 511 U.S. at 180 ("A plaintiff must show reliance on the *defendant's* misstatement or omission to recover under 10b-5. Were we to allow the aiding and abetting action proposed in this case, the *defendant* could be liable without any showing that the plaintiff relied upon the *aider and abettor's* statements or actions.") (emphases added and internal citations omitted). Indeed, "[r]eliance provides the requisite causal connection between a *defendant's* misrepresentation and a plaintiff's injury." *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988) (emphasis added).

Less than a month after *Central Bank* was decided, then-SEC Chairman Arthur Levitt told Congress that *Central Bank* required defendant-by-defendant reliance under §10(b): "[a]s the Supreme Court emphasized in *Central Bank of Denver*, a private plaintiff under Rule 10b-5 must show, *defendant by defendant*, that the plaintiff reasonably

relied on the defendant's misstatement or omission." *Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation, Hearing before the Subcomm. on Secs. of the S. Comm. on Banking, Hous. & Urban Affairs,* 103d Cong. 51 (1994) (statement of Arthur Levitt, Chairman, SEC) (emphasis added). Congress left *Central Bank's* requirement of defendant-by-defendant reliance untouched in the PSLRA.

The reliance element under §10(b) may be satisfied by a rebuttable presumption of reliance in two different circumstances. First, reliance may be presumed where a defendant who owes a duty to disclose to the plaintiff omits to state a material fact. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972). This presumption is inapplicable here, where petitioner Janus Capital Management, LLC ("JCM"), an investment adviser, was found by the district court below not to have owed a duty to disclose to respondents, the shareholders of its parent company (a finding left undisturbed by the Fourth Circuit). Second, under the fraud-on-the-market doctrine, reliance may be presumed when a defendant's allegedly false statements become public and are reflected in the market price of the security. *See Basic*, 485 U.S. at 247; *Stoneridge*, 552 U.S. at 159. However, the fraud-on-the-market presumption of reliance must still satisfy the requirement of defendant-by-defendant reliance, in that a plaintiff must still allege and prove

"that the *defendant* made public misrepresentations." *Basic*, 485 U.S. at 248 n.27 (emphasis added).

Here, the fund prospectuses that contained the allegedly false statements were not attributed to JCM and, as the Fourth Circuit noted, "the clear essence of plaintiff's complaint is that . . . JCM *helped draft* the misleading prospectuses." Pet. App. at 17a (emphasis added). Under these circumstances, where no alleged false or misleading statements were publicly attributed to JCM, respondent cannot establish the defendant-by-defendant reliance that is required by *Central Bank* and *Stoneridge*. *See Stoneridge*, 552 U.S. at 159 (stating that because "[n]o member of the investing public had knowledge, either actual or presumed, of *respondents'* deceptive acts . . . [p]etitioner . . . cannot show reliance upon any of *respondents'* actions except in an indirect chain that we find too remote for liability") (emphasis added).

The majority rule, from which the Fourth Circuit departed in its decision below, recognizes the element of defendant-by-defendant reliance cannot be satisfied where a false or misleading statement is not directly and publicly attributed to the defendant:

> [t]he mere identification of a secondary actor as being involved in a transaction, or the public's understanding that a secondary actor is at work behind the scenes are alone insufficient. To be

> cognizable, a plaintiff's claim against a secondary actor must be based on *that actor's own articulated statement,* or on statements made by another that have been *explicitly adopted by the secondary actor.*

Pac. Inv. Mgmt., 603 F.3d at 155 (emphasis added) (internal citations and quotes omitted); *see also Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998) ("[A] secondary actor cannot incur primary liability under the [Securities Exchange] Act for a statement not attributed to that actor at the time of its dissemination. . . . Thus, the misrepresentation must be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision.").[6]

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[6] *See also Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) ("[W]e conclude that, in light of *Central Bank*, in order for the defendant to be primarily liable under §10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made."); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) ("[W]e conclude that in order for accountants to 'use or employ' a 'deception' actionable under the antifraud law, they must themselves make a false or misleading statement (or omission) that they know or should know will reach potential investors."); *SEC v. Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008) ("[T]he attribution requirement of the bright-line test stems directly from the need for *private* litigants to prove reliance on an alleged fraud to succeed on a *private* cause of action.").

In contrast, the Fourth Circuit's decision, by erasing the distinction between defendants to whom false or misleading statements are directly and publicly attributed and those who merely participate in drafting, preparing, or approving the statements, improperly substitutes reliance on the *statements* for reliance on the *defendant* as an element of a §10(b) cause of action. *See* Pet. App. at 19a ("While the prospectuses did not explicitly name [JCM] as the drafter[], plaintiffs nevertheless allege in their complaint that [JCM] may be held responsible for the statements in the prospectuses because as a practical matter JCM runs the Janus funds.") (internal quotation omitted). However, merely alleging reliance on another entity's false or misleading *statements* does not satisfy the element of defendant-by-defendant reliance required by *Central Bank* and *Stoneridge*. *See Pacific Investment Management Company*, 603 F.3d at 156 ("Without explicit attribution to the firm . . . reliance on that firm's participation can only be shown through 'an indirect chain . . . too remote for liability.'") (*citing Stoneridge*). *Stoneridge* forbids precisely this sort of expansion of the §10(b) implied right of action.

C. Expanding Primary Liability To Secondary Actors To Whom No False or Misleading Statements Are Directly And Publicly Attributed Is Incompatible With The PSLRA's Defendant-By-Defendant Loss Causation Requirement.

Extending §10(b) liability to secondary actors to whom no false or misleading statement or conduct is directly and publicly attributed is also incompatible with the PSLRA's defendant-by-defendant loss causation requirement. The PSLRA requires that the plaintiff allege and prove that "the act or omission of *the defendant* alleged to violate this chapter caused the loss." 15 U.S.C. §78u-4(b)(4) (emphasis added). This express statutory requirement is satisfied only by showing that the price of securities purchased or sold by the plaintiff declined because of the particular defendant's deceptive act or omission. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005); *see also Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 158 (2d Cir. 2007) ("Plaintiffs have not alleged facts to show that *Deloitte's misstatements*, among others (made by Warnaco) that were much more consequential and numerous, were the proximate cause of plaintiffs' loss.") (emphasis added).

The Fourth Circuit's decision to expand primary liability under §10(b) to a defendant where there is no public attribution of any false or misleading statement to "the defendant" contradicts

the PSLRA's express requirement of defendant-by-defendant loss causation. All that the Fourth Circuit would require would be an allegation that the defendant substantially participated in some other defendant's statement or omission. Pet. App. at 24a. However, such an allegation, without more, would not satisfy the PSLRA's requirement that "the act or omission *of the defendant*" be the cause of the loss. Thus, the Fourth Circuit's expansion of the §10(b) implied right of action is incompatible with the PSLRA's express language.

D. The Expansion Adopted By The Fourth Circuit Is Uncertain And Unworkable.

As *Central Bank* held, liability under §10(b) is "'an area that demands certainty and predictability.'" 511 U.S. at 188 (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988).). The test adopted by the Fourth Circuit, which extends §10(b) liability to secondary actors if a court finds that "interested investors" would "attribute to the defendant a substantial role in preparing or approving" an alleged false statement, clouds with uncertainty the question of who can be primarily liable under §10(b) and burdens district courts with a liability test that is unworkable in application. Pet. App. at 24a.

The SEC has also advocated for a similar test, which it calls the "creator" test, pursuant to which a defendant would be liable under §10(b) for "creating"

a false or misleading statement on which investors relied, even if the defendant did not make the statement and the statement was not publicly attributed to him. *See* Brief for S.E.C. as Amicus Curiae Supporting Plaintiffs-Appellants at 7, *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010) (No. 09-1619-cv). The SEC's proposed test suffers from all the same defects as the Fourth Circuit's, including unpredictability and uncertainty.

In *Pacific Investment Management Co. v. Mayer Brown LLP*, the Second Circuit properly rejected the SEC's "creator" test. It concluded that "[a] creator standard would inevitably lead to uncertainty regarding the scope of Rule 10b-5 liability and potentially deter beneficial conduct" in that it "establishes no clear boundary between primary violators and aiders and abettors, and it is uncertain what level of involvement might expose an individual to liability." 603 F.3d at 157.

The same is true for the Fourth Circuit's test. By requiring a fact-intensive, case-by-case assessment in order to determine whether a defendant's participation in a false or misleading statement warranted attributing "a substantial role" to the defendant, the Fourth Circuit's test is certain to breed inconsistency in its application and outcome. And by blurring the clear line between defendants to whom false statements are directly and publicly attributed and everyone else who is involved in the preparation of a public statement, the Fourth

Circuit's decision fosters *ad hoc* judicial rule making that guarantees unpredictability and uncertainty for financial industry participants. *See Central Bank*, 511 U.S. at 188 (uncertainty in the scope of §10(b) and Rule 10b-5 liability results in "decisions made on an ad hoc basis, offering little predictive value to those who provide services to participants in the securities business") (internal quotation omitted).

Under the Fourth Circuit's test, financial industry participants who are named as defendants in securities litigation would face a highly unpredictable outcome with enormous financial stakes. Thus, they would have every incentive to "as a business judgment . . . abandon substantial defenses and . . . pay settlements in order to avoid the expense and risk of going to trial." *Id.* at 189. The Fourth Circuit's test will also raise costs for issuers, particularly new and less established businesses seeking to raise capital in the financial markets. Indeed, "newer and smaller companies may find it difficult to obtain advice from professionals. A professional may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others." *Id.*

The necessary certainty and stability can be provided only by the bright-line rule adopted by a majority of federal appellate courts, requiring that misstatements be directly and publicly attributed to a defendant to establish liability under §10(b). *See Pac. Inv. Mgmt.*, 603 F.3d at 155 ("[S]econdary actors can

be liable in a private action under Rule 10b-5 for only those statements that are explicitly attributed to them."); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) ("[T]he alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made."); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1226 (10th Cir. 1996) ("[F]or an accountant's misrepresentation to be actionable as a primary violation, there must be a showing that he knew or should have known that his representation would be communicated to investors."). A bright line rule makes clear to all financial industry participants that "those who sign or otherwise allow a statement to be attributed to them expose themselves to liability," while those who do not sign "are beyond the reach of Rule 10b-5's private right of action." *Pac. Inv Mgmt.*, 603 F.3d at 157. A bright line rule is easier for district courts to apply, avoids protracted litigation, and discourages "discovery aimed at learning the identity of each person or entity that had some connection, however tenuous, to the creation of an allegedly false statement." *Id.*

E. The Expansion Adopted By The Fourth Circuit Would Discourage Issuers From Listing On U.S. Exchanges.

As the Court noted in *Stoneridge*, expanding the §10(b) implied right of action would "raise the

cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." 552 U.S. at 164. United States capital markets have become less competitive with their counterparts around the world, in large part because of fears of costly U.S. securities litigation. *See* U.S. Chamber of Commerce, *Commission on the Regulation of U.S. Capital Markets in the 21st Century: Report and Recommendations* (2007);[7] Michael R. Bloomberg and Charles E. Schumer, *Sustaining New York's and US' Global Financial*

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[7] Available at http://www.uschamber.com/sites/default/files/reports/0703capmarkets_full.pdf. *See also Howell E. Jackson, Summary of Research Findings on Extra-Territorial Application of Federal Securities Law,* in *Global Capital Markets & U.S. Securities Laws,* 1743 PLI/Corp. 1243, 1253 (2009) ("Many interviewees cite U.S. anti-fraud laws—specifically Rule 10b-5—as a 'top concern' because they are the 'most intrusive' and have the 'biggest' impact on extra-territorial transactions."); Jonathan Macey, *What Sarbox Wrought*, Wall St. J., Apr. 7, 2007, at A9 ("All of a sudden it is no longer fashionable to be a U.S. public company: It's for suckers who can't access the piles of sophisticated 'global' capital available elsewhere. . . . If the U.S. is to regain its former position in the world capital market, much more will have to be done. Massive litigation risk remains . . . ."); Ian Swanson, *Foreign Executives Press For Reform Of Litigation in United States*, The Hill, May 18, 2007, at 11 ("[L]itigation is a greater disincentive to doing business in the U.S. than fears that a protectionist Congress might impose new barriers to foreign trade and investment."); Alan Beattie, *London Named Top Financial Centre*, Fin. Times, June 12, 2007, at 6 (the United States has been disadvantaged because of its "litigious and apparently arbitrary culture of regulation and policy").

Services Leadership (Jan. 22, 2007);[8] Comm. on Capital Mkts., *Interim Report of the Committee on Capital Markets Regulation*, at 11 (Nov. 30, 2006).[9]

This was highlighted in a non-partisan report commissioned by New York City Mayor Michael Bloomberg and New York Senator Charles Schumer, entitled *Sustaining New York's and US' Global Financial Services Leadership* (the "Report"). The Report found that the threat of costly securities litigation was a significant deterrent to foreign companies wishing to do business in the United States. Report at 101. The Report also found that "a fair and predictable legal environment" was among the most important factors considered in the assessment of places to do business and that the United States was perceived to be at a significant disadvantage with regard to the fairness and predictability of its legal environment. *Id.* at 16.

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[8] Available at http://www.abanet.org/buslaw/committees/CL116000pub/materials/library/NY_Schumer-Bloomberg_REPORT_FINAL.pdf ("[T]he legal environments in other nations, including Great Britain, far more effectively discourage frivolous litigation" while "the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business -- and driven away potential investors.").

[9] Available at http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf ("Foreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market.").

The Fourth Circuit's test would add to the cost and unpredictability of securities litigation and drive away companies wishing to list their securities on U.S. exchanges. Under the Fourth Circuit's test, securities litigation will become more costly as the ranks of potential defendants expand to include lawyers, accountants, bankers, investor relations consultants, and other financial market professionals. The subjective and highly fact-intensive nature of the Fourth Circuit's test would add to the cost of securities lawsuits by prompting litigation in almost every case as to whether a service provider's participation in an issuer's alleged false statement was sufficiently "substantial" to support a claim for primary liability under §10(b). Inevitably, numerous issuers would list securities elsewhere — or forego capital raising — rather than indemnify all these service providers against §10(b) class action litigation costs.

The Fourth Circuit's test would also yield unpredictable results. Individual trial courts applying the test on a "case by case" (Pet. App. 24a) basis will have differing and inconsistent views as to whether a given service provider's level of participation is "substantial" enough to merit attributing an alleged false statement to that service provider, which will lead to *ad hoc* and inconsistent judicial rulemaking. Such a test will also add to the complexity of a jury's task at trial, as jurors grapple with assigning liability among various lawyers, accountants, bankers, and other market professionals based on whether they

"substantially" participated in an alleged false statement. All of this will only strengthen the prevailing view that §10(b) class action liability is too costly and unpredictable to do business here.

II. INDEPENDENTLY, LIABILITY UNDER RULE 10(b)-5(b) DOES NOT EXTEND TO THOSE WHO DO NOT MAKE FALSE OR MISLEADING STATEMENTS ABSENT A DUTY TO SPEAK.

A. Extending Liability Under Rule 10b-5(b) To Those Who Do Not Themselves "Make" A Misstatement Contradicts The Text Of The Rule.

Independently, the Fourth Circuit's decision, which held that a defendant who *substantially participated* in drafting or disseminating a false statement could be deemed to have made the false statement for purposes of assessing liability under §10(b), contradicts the text of Rule 10b-5(b).[10] Rule 10b-5(b) renders it unlawful for any person "to *make* any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 CFR §240.10b-5(b) (2010) (emphasis added).

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[10] This brief addresses only Rule 10b-5(b) because there are no questions presented on appeal concerning sub-sections (a) or (c) of Rule 10b-5.

The alleged false statements that are at issue here were not publicly attributed to JCM, and JCM is nowhere identified as the "maker" of the false statements. Pet. App. at 17a. Nevertheless, the Fourth Circuit held that, for purposes of assessing liability under Rule 10b-5(b), JCM could be deemed to have made the false statements because it "*caus[ed]* mutual fund prospectuses" containing the statements "to be issued" and "ma[de] them available for the investing public" by filing them with the SEC and posting them on a website. Pet. App. at 17a-18a (quotation omitted) (emphasis added). The Fourth Circuit found that "[t]hese statements, taken together, allege that . . . JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." Pet. App. at 18a (emphasis in original).

The Fourth Circuit's decision contradicts the text of Rule 10b-5(b). By focusing on those who "make" false or misleading statements, Rule 10b-5(b) is clearly intended to reach *speakers* — issuers and the corporate officers to whom an issuer's statements are directly and publicly attributed. Rule 10b-5(b) does not reach non-speakers who merely participate in or assist with the drafting and dissemination of public statements, but to whom no statements are directly and publicly attributed.

As an analogy, consider an unsigned and unattributed newspaper editorial. The editorial is the statement of an organization, not of unnamed

participants in creating the editorial. The newspaper is the speaker, not those who draft, review, edit, or approve the editorial. Those who do not sign the written statements of an organization, and who do not have such statements attributed to them, simply do not "make" the statements issued by the organization.

B. Extending Liability Under Rule 10b-5(b) To Those Who Participate In Drafting Or Disseminating A Misstatement Contravenes *Central Bank*.

The Fourth Circuit's decision, by conflating *participating* in drafting and disseminating a false statement with *making* a false statement, revives aiding and abetting liability in contravention of *Central Bank*. *See Central Bank*, 511 U.S. at 177 ("[T]he statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act."). Liability based on participation in another's false statement is aiding-and-abetting liability under a different label, as the Fourth Circuit's own language illustrates. *See* Pet. App. at 17a ("In this case . . . the clear essence of the plaintiffs' complaint is that . . . JCM *helped* draft the misleading prospectuses.") (emphasis added); *see also Shapiro*, 123 F.3d at 720 ("Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms . . . all fall within the prohibitive bar of *Central Bank*.").

Under §104 of the PSLRA, Congress entrusted the SEC — and only the SEC — with the power to bring a civil enforcement action against "any person that knowingly provides substantial assistance to another person in violation of" §10(b) and Rule 10b-5. 15 U.S.C. §78t(e). This was a considered policy choice by Congress. *See Stoneridge*, 552 U.S. at 166 (noting that "the enforcement power is not toothless"). Extending the §10(b) implied private right of action so that every class action lawyer in America could sue anyone who participated in another person's §10(b) violation would obliterate the line drawn by Congress.

Like §104 of the PSLRA, other provisions of the 1933 and 1934 Acts also allow only the SEC and the Justice Department, not private litigants, to sue secondary actors who participate in another's primary violation. Respondent's argument would undo Congress' policy decision to entrust government regulators and prosecutors, rather than private class actions lawyers, with policing these secondary actors. In §17(a) of the 1933 Act, for example, Congress expressly rendered it unlawful "to engage in any *transaction*, practice, or *course of business* which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. §77q(a)(3). Unlike §10(b), §17(a)(3) expressly covers defendants who engage in a "transaction" or "course of business," rather than those who "use" or "employ" a deceptive device itself. The SEC regularly invokes §17(a) in enforcement actions against secondary actors. *See, e.g., Weiss v. SEC*, 468 F.3d 849, 855-56 (D.C. Cir. 2006). However,

there is no private right of action under §17(a). *See, e.g., Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992).

Congress left to the SEC and the Justice Department the sole power to enforce the more sweeping prohibitions applicable to secondary actors under §17(a). In doing so, Congress chose not to leave enforcement against secondary actors in the hands of the class action bar, where prosecutorial decisions would be driven by purely private economic, rather than public, interests. *See also* §§15 U.S.C. 78o(b)(4)(E), 78u-3(a) (granting the SEC, not private class action plaintiffs lawyers, the power to sue registered broker-dealers and "associated persons" who "willfully aided, abetted, counseled, commanded, induced, or procured" violations of the securities laws). The Court should continue this policy choice by Congress and not undo it by expanding the §10(b) private right of action.

C. Extending Liability Under Rule 10b-5(b) To Defendants Who Participate In Drafting Or Disseminating A Misstatement Would Contravene Settled Law That Those Who Are Silent Are Not Liable Absent A Duty To Speak.

When an issuer, or any company, makes a statement, the speaker is the company itself and those of its officers who have signed the statement, spoken the words, or personally have a duty to disclose. To hold otherwise would be to vastly expand the categories of individuals and entities that can be sued in §10b cases.

By definition, those who "participate" in an issuer's public statements do not themselves speak. They are silent. Silence is not actionable under §10(b) "absent a duty to speak." *Chiarella v. United States*, 445 U.S. 222, 235 (1980). Thus, while those who sign or otherwise allow a statement to be attributed to them expose themselves to liability, those who do not are beyond the reach of §10(b) and Rule 10b-5(b), absent a duty to investors to speak.

And not just any duty suffices — the defendant must have a "duty to disclose arising from a relationship of trust and confidence *between parties to a transaction*." *Id.* at 230 (emphasis added). And to have an implied §10(b) private right of action, a plaintiff must show not merely a violation of law, but

a breach of a legal duty owed to *that specific plaintiff*. *See, e.g., Stoneridge*, 552 U.S. at 159 (explaining that "if there is an omission of a material fact *by one with a duty to disclose*, the investor *to whom the duty was owed*" will be presumed to have relied on the omission) (emphasis added); *Bangor Punta Operations v. Bangor & Aroostook R.R.*, 417 U.S. 703, 716 n.13 (1974) ("[T]he recovery provided is intended to compensate, not the public generally, but those who have been injured by a breach of duty owed to them."); *Foss v. Bear, Stearns & Co.*, 394 F.3d 540, 541 (7th Cir. 2005) (Easterbrook, J.) (§10(b) private civil claim requires deceit against the plaintiff); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 13, 16 (2d Cir. 1983) (explaining that, although investment bank employee was convicted of criminal §10(b) violation for insider trading, shareholders in target company had no §10(b) claim because "[t]here is no 'duty in the air' to which any plaintiff can attach his claim") (citation omitted); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992) (plurality opinion) (citing Black's Law Dictionary 1489 (6th ed. 1990) as "defining 'tort' as 'always [involving] a violation of some duty *owing to plaintiff*'") (emphasis added; brackets in original). No such duty can be alleged here between JCM, an investment adviser, and respondents, the shareholders of a different company — the investment adviser's parent. *See* Pet. Br. at 42.

D. Extending §10(b) Liability To Those Who Cause A Misstatement To Be Made Would Nullify Statutory Limitations On The Express Private Right of Action Under §18(a) Of The 1934 Act.

The Fourth Circuit's test would extend Rule 10b-5(b) liability to those who "caused" a false statement to be made. Pet. App. 17a-18a. Rule 10b-5(b) applies only to defendants that "make" a statement. In contrast, the limited but express right of action that Congress provided in §18(a) of the 1934 Act imposes liability on a defendant who "shall make *or cause to be made*" a statement that is "false or misleading with respect to any material fact" in "any application, report or document filed" pursuant to the Exchange Act. 15 U.S.C. §78r(a). Surely, when the SEC promulgated 10b-5(b) in 1942, it understood that "make or cause to be made" is broader than "make." Ignoring that the SEC chose the narrower term "make," the Fourth Circuit's test improperly extends Rule 10b-5(b) to defendants that only "caused" statements to be made.

Moreover, although express §18(a) private liability reaches a broader array of defendants than §10(b), Congress imposed in §18(a) a critical limitation to preclude excessive damages liability: the plaintiff must have actually read and relied upon the alleged false statement. Section 18(a) limits potential plaintiffs to "any person . . . who, *in reliance upon*

such statement, shall have purchased or sold a security at a price which was affected by such statement, for *damages caused by such reliance.*" *Id.* (emphasis added). Because §18(a) expressly refers to the plaintiff's reliance on the specific statement, it can be satisfied only by proof of individual reliance, rather than by the fraud-on-the-market presumption. *See, e.g., In re Suprema Specialties, Inc. Secs. Litig.*, 438 F.3d 256, 283-84 (3d Cir. 2006); *Heit v. Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

By contrast, in private §10(b) actions, the reliance requirement is not a statutory creation but rather was judicially implied to delimit the implied cause of action. *See Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988). Allowing the fraud-on-the-market presumption to satisfy reliance in a §10(b) action does not render §18(a) a nullity only so long as the class of defendants that can be sued in a §10(b) implied private civil action is narrower than in the express §18(a) action. The Fourth Circuit's test erases that line by extending liability under §10(b) to those who cause a false statement to be made. Such expansive implied civil liability under §10(b) would nullify the statutory limitations on private civil liability that are contained in §18(a). Section 10(b) should not be interpreted to erase the limits set forth by Congress in an express cause of action in the 1934 Act. *See Central Bank*, 511 U.S. at 184 ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate

congressional choice with which the courts should not interfere.").

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP, INC. AND
JANUS CAPITAL MANAGEMENT LLC,
Petitioners,

v.

FIRST DERIVATIVE TRADERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE COUNCIL OF INSTITUTIONAL INVESTORS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Council of Institutional Investors is a not-for-profit association of more than 120 public, labor, and corporate pension funds with assets exceeding $3 trillion. Its members are major long-term shareholders with duties to protect the retirement assets of millions of American workers. The Council is an advocate for strong corporate governance standards. Its members seek to protect fund assets through proxy votes, shareholder resolutions, negotiations with regulators, discussions with management, and, when necessary, litigation. The Council has previously appeared as an amicus in cases affecting shareholder rights. See, *e.g.*, *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Board*, 130 S.Ct. 3138 (2010); *Merck & Co., Inc.* v. *Reynolds*, 130 S.Ct. 1784 (2010); *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

The interests of the Council and its members are directly implicated by this case. In the Private Securities Litigation Reform Act of 1995 (PSLRA), Congress recognized that institutional investors are America's largest shareholders and "have the most to gain from meritorious securities litigation." H.R. Conf. Rep. No. 104-369, at 34 (1995) (quoting testimony of Maryellen Andersen, then treasurer of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

the Council). Institutional investors also have the most to lose from meritless litigation that depletes shareholder wealth. See S. Rep. No. 104-98, at 9 (1995) ("We are . . . hurt if a system allows someone to force us to spend huge sums of money in legal costs by merely paying ten dollars and filing a meritless cookie cutter complaint against a company or its accountants." (quoting testimony of Maryellen Andersen)). Accordingly, the Council has a strong interest in ensuring that the Court's interpretation of §10(b) of the Securities Exchange Act and rule 10b-5 continues to honor the longstanding aims of those provisions—deterring fraud in the securities markets and compensating those actually injured by such fraud. The Council believes that the interpretation of these provisions should further Congress's manifest goal of allowing legitimate suits to proceed while discouraging meritless "strike suits."

SUMMARY OF ARGUMENT

The prevalence of securities fraud schemes detailed daily in the American press over the last decade provides a strong indication that the need for effective private enforcement of the antifraud provisions of federal securities law remains high. Narrowing the scope of primary liability to exclude secondary actors entirely, or instituting a new requirement that fraud-on-the-market reliance can only be established when bad actors make themselves known through express attribution, would ignore that need in contravention of Congress's plain intent, unjustifiably immunize conduct that is currently prohibited, and provide a roadmap for future fraudsters to avoid liability for their fraudulent acts.

Nor is there substantial risk that retaining these features of the private 10b-5 remedy as they

have been interpreted for decades will increase nonmeritorious class action filings. Indeed, all the relevant empirical trends indicate that both filings and settlements of securities class actions continue to decrease from pre-PSLRA levels, even though secondary-actor liability and the lack of an express attribution requirement are present features of securities law. The Court has striven for a sensible balance between deterring fraud and avoiding the social costs of frivolous litigation. The changes petitioners seek would sharply undermine the first of those goals without substantially advancing the second. Those changes are not dictated by this Court's precedents or the language that Congress and the SEC used in drafting §10(b) and rule 10b-5. And they should be rejected.

Even if an express attribution requirement is adopted, however, this case should nonetheless be reanalyzed in light of the fiduciary duty that investment advisers like petitioners owe to investors, including a duty to disclose that extends to disclosing the adviser's role in making public statements by a mutual fund.

ARGUMENT

I. ACHIEVING CONGRESS'S GOAL OF DETERRING SECURITIES FRAUD REQUIRES THE STRONG INCENTIVES PROVIDED BY A ROBUST PRIVATE RIGHT OF ACTION UNDER RULE 10B-5.

A. There Is No Question That Secondary Actors Are, and Must Remain, Primarily Liable for Their Fraudulent Acts.

Section 10(b) of the Securities Exchange Act of 1934, codified as amended at 15 U.S.C. §78j, provides that it

> shall be unlawful for any person, directly or indirectly, . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. §78j(b).

Pursuant to this grant of authority, the SEC has promulgated rule 10b-5, which makes it

> unlawful for any person, directly or indirectly, . . . [t]o make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security. 17 C.F.R. §240.10b-5.

As the text of these legislative and administrative pronouncements makes clear, and as this Court's precedents properly recognize, so-called "primary liability" under rule 10b-5 clearly and correctly extends beyond a single actor to encompass those "secondary" actors who engage in, rather than merely aid and abet, proscribed activity. *E.g.*, *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (recognizing that any "secondary" actor "including a lawyer, accountant, or bank . . . may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under rule 10b-5 are met" and expressly noting that in "any complex securities fraud, moreover, there are likely to be multiple violators"); accord *Stoneridge*, 552 U.S., at 166 ("[T]he implied

right of action in §10(b) continues to cover secondary actors who commit primary violations.").

These clear pronouncements cannot be reconciled with petitioners' repeated assertions that participating in fraudulent conduct is in all cases excepted from private liability.[2] *E.g.*, Pet. Br. 11 ("'Participation' is a signifier of secondary action, and a service provider cannot be held liable for assisting another company with its public statements."); *id.*, at 35-36 ("Nor is there private liability for 'participating' in the writing of another company's statement."). Indeed, petitioners are admirably direct in arguing that, for purposes of rule 10b-5(b), the *only* entity to whom liability could ever possibly attach is the one that voluntarily self-identifies as the "speaker"—that signs its name to a statement, as it were—no matter the degree of involvement another entity may have in writing, editing, or even delivering the statement or the degree of control another entity may exercise over the "speaker." *Id.*, at 37-38.

There is a real and substantial difference between "participat[ing] in a scheme to violate §10(b)," *Stoneridge*, 552 U.S., at 156, and participating in the making of a public misstatement of material fact. The plaintiffs' factual allegations in this case, which must be accepted as true, draw a picture of fraud perpetrated by insiders that is a far cry from the

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[2] The Council concurs with respondent that resolving this case does not require addressing the liability of true secondary actors because petitioners are properly classified as primary actors. Resp. Br. 35-41. The Council discusses this point in response to the claims made by petitioners and their amici only to explain why continuing to subject secondary actors to securities fraud liability is both necessary and within Congress's clear intent.

scheme liability based on an "arm's length business transaction in goods or services other than securities" that was rejected in *Stoneridge*. See *In re Charter Commc'ns, Inc., Sec. Litig.*, 443 F.3d 987, 992-993 (CA8 2006), aff'd *sub nom. Stoneridge*, 552 U.S., at 167. Nor is petitioners' position consistent with statements from this Court that bear directly on the question. Petitioners wholly ignore—and fail even to acknowledge—*Central Bank*'s sensible recognition that in "any complex securities fraud, . . . there are likely to be multiple violators." 511 U.S., at 191.

Petitioners' suggestion that it is, in essence, impossible for more than one person or entity to "make" a statement within the meaning of rule 10b-5 and §10(b) is equally absurd.

> "The word 'make' has many meanings, among them 'To cause to exist, appear or occur,' Webster's International Dictionary, (2d Ed.). To hold the statute broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows gives to the words employed their fair meaning and is in accord with the evident intent of Congress. To hold that it applies only when the accused personally writes the false entry or affirmatively directs another so to do would emasculate the statute—defeat the very end in view." *United States* v. *Giles*, 300 U.S. 41, 48 49 (1937) (construing predecessor to 18 U.S.C. §1005, concerning the making of a "false entry in any book, report, or statement" of certain banks).

At the least, the Court should adopt the position on the meaning of rule 10b-5's use of "make" ably articulated by the Federal Government and the SEC.

B. Requiring Direct and Express Attribution Would Foster Fraud and Badly Disserve Congress's Goals.

For similar reasons, the Court should not adopt petitioners' contention that only express attribution of statements to particular actors is sufficient to establish reliance on those statements under a fraud-on-the-market theory. Adopting a strict attribution requirement is inconsistent with the realities of modern securities markets and would actively encourage fraud, most troublingly by actors who, like petitioners, can exert control over issuers to ensure that statements are not attributed to them.

Attribution as a component of market reliance is an artificial concept, and one that finds no real basis in this Court's decisions. See, *e.g.*, *Stoneridge*, 552 U.S., at 159-160 (omitting any mention of attribution as a necessary component of reliance on public statements); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242-244 (1988) (same); Prentice, *Stoneridge*, Securities Fraud Litigation, and the Supreme Court, 45 Am. Bus. L.J. 611, 654 (2008) ("Until the lower courts started fumbling around with *Central Bank*, no court in the history of fraud jurisprudence had held that a fraudster may avoid liability by the simple expedient of refusing to allow his name to be attached to a fraudulent statement that he might have initiated, drafted, reviewed, and/or corrected.").

That fact reflects market reality: Whether public information is attributed, and to whom, may alter the weight given that information by the market, but it is not true to say either that unattributed information is rejected or that attribution to a reasonable source does not occur. Thus, attribution may go to the question of *materiality* of a particular statement, but

it has little to do with whether the market as a whole can be said to have *relied* on it.[3] That, in fact, is the entire premise of the fraud-on-the-market presumption: "In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value." *Basic Inc.*, 485 U.S., at 244 (quoting *Peil* v. *Speiser*, 806 F.2d 1154, 1161 (CA3 1986)). The market relies on *all* public information, regardless of its authorship, but it does so to varying degrees. Indeed, a fraudster's intentional misattribution of a statement may actually increase the materiality of a

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[3] A recent decision from the Fifth Circuit requiring express attribution to demonstrate reliance outside a fraud-on-the-market context provides a clear example of this illogic. See *Affco Investments 2001 LLC* v. *Proskauer Rose L.L.P.*, __ F.3d __ (CA5 Oct. 27, 2010) (slip op., at 13) ("Knowing the identity of the speaker is essential to show reliance because a word of assurance is only as good as its giver."). While this idealized view may provide good advice, markets in truth rely on anonymous information regularly, even when doing so may be unreasonable or risky; attribution is not a necessary condition for such reliance. And erroneous for a similar reason is the belief that "[a]bsent attribution, plaintiffs cannot show that they relied on defendants' *own* false statements." *Ibid.* (quoting *Pac. Investments Mgmt. Co.* v. *Mayer Brown LLP*, 603 F.3d 144, 148 (CA2 2010)). Fraud-on-the-market theory presumes reliance on the information publicly conveyed in a statement, not on the imprimatur of the one who makes it. See *Basic Inc.*, 485 U.S., at 244. Attribution is logically necessary only to show reliance on imprimatur—that is, on the fact that a particular defendant made the statement. But when plaintiffs demonstrate that the defendant did make the statement and that the market relied on that public information, they have indeed shown "that they relied on defendants' *own* false statements." *Affco Investments 2001*, __ F.3d, at __, (slip op., at 13).

particular statement, and it is nonsensical to suggest that the success of such a scheme is sufficient to immunize it from fraud liability under §10(b) and rule 10b-5.

At same time, the Court, as the markets necessarily do, should take cognizance of the clear distinction between conduct that is attribut*ed* and conduct that is attribut*able*. Not all statements that are unattributed are unattributable, and the markets receive and process information, assigning it value by making judgments about its source on a constant basis. If attribution were a necessary component of reliance—a dubious proposition—it must necessarily reflect these realities of the market. Thus, if a reasonable investor aware of the circumstances would understand a particular actor to be making a statement even without express attribution, it violates the realism that underlay adoption of the fraud-on-the-market theory of reliance in the first place to preclude reliance on that statement simply because those involved in making it did not identify themselves. See *Basic Inc.*, 485 U.S., at 243-244 ("The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases, and our understanding of rule 10b-5's reliance requirement must encompass these differences." (footnotes omitted)).

The attribution requirement "creates a safe harbor whereby a cunning wrongdoer will not be exposed to liability if he simply avoids the association of his name with the misleading statement at the time of its dissemination, regardless of his actual responsibility. This creates an end run around the goals of fairness, honesty, and full disclosure."

Grubb, Attorneys, Accountants, and Bankers, Oh My! Primary Liability for Secondary Actors in the Wake of *Stoneridge*, 62 Vand. L. Rev. 275, 298 (2009). Worse still, allowing an issuer to make material public misstatements through the agency of a nominally separate entity that it actually controls would open a gaping loophole in the securities laws. The corporate structure that permits petitioners to straightfacedly assert that, as a matter of law, they have no liability for misstatements they allegedly participated in making, about a policy they certainly directed, need not be confined to the mutual fund industry. It would be ironic—and tragic for American investors—if the management structure imposed in that industry by the Investment Company Act of 1940 to eradicate conflicts of interest should, decades later, provide a roadmap for restructuring other securities issuers, even publicly traded corporations, so as to preclude any possibility of fraud liability under the securities laws.[4] Requiring express attribution in order to recognize the market's reliance on a statement is a legal fiction that deviates sharply from reality; it is made a travesty when the actor whose nonattribution shields it from liability

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[4] Indeed, hedge funds and private equity funds already commonly employ similar corporate structures. See, *e.g.*, Bullard, Regulating Hedge Fund Managers: The Investment Company Act as a Regulatory Screen, 13 Stan. J.L. Bus. & Fin. 286, 305 (2008) (noting that the publicly traded Blackstone Group, for example, is structured as a general partnership with a "separate entity controlled exclusively by Blackstone management . . . as the sole general partner" which "public investors have no ability to remove" and that Blackstone and others have claimed that such structure permits them to evade regulatory classification under the Investment Company Act of 1940).

actually controls both the statement and the attribution process itself. Foxes should not be left to guard henhouses.

Allowing an issuer to make material public misstatements through the agency of a nominally separate entity that it actually controls would ignore the reality of securities fraud and unjustifiably exalt form over substance. There is no plausible reading of §10(b) or rule 10b-5 that suggests liability under those provisions is limited to only those instances of fraud where the fraudster is open and aboveboard about his actions.

C. Developments Since *Central Bank* Underscore the Continuing Need to Police the Markets and Provide Strong Disincentives to Fraud.

Primary liability under rule 10b-5 must continue to extend to secondary actors, and fraud-on-the-market reliance must not be hamstrung by an artificial express attribution requirement, in order to provide adequate deterrence against fraud. "The securities statutes seek to maintain public confidence in the marketplace. They do so by deterring fraud, in part, through the availability of private securities fraud actions." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005); accord *Randall* v. *Loftsgaarden*, 478 U.S. 647, 664 (1986) ("Congress' aim in enacting the 1934 Act was not confined solely to compensating defrauded investors. Congress intended to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions."); see also S. Rep. No. 73-792, at 1-5 (1934) (highlighting the purposes of establishing the SEC and granting it authority to enforce the Securities Exchange Act of 1934—to

ensure honest markets for securities and to promote investor confidence).

In this, the American model of market transparency enforced through regulation has been wildly successful. Indeed, it has long been understood that United States capital markets are the deepest and most liquid anywhere in major part precisely because they have been widely and correctly perceived as the fairest and best policed in the entire world. See Bhide, Efficient Markets, Deficient Governments, Harv. Bus. Rev., Nov. 1994, at 128, 130-131 ("U.S. rules protecting investors are the most comprehensive and well enforced in the world."); see also Coffee, Law and the Market: The Impact of Enforcement, 156 U. Pa. L. Rev. 229, 245-246 (2007) (arguing that "the greater institutional commitment of the United States to enforcement—administered by multiple and often competing enforcers, private and public"—"disproportionately repel[s] particular classes of issuers" but simultaneously lowers the cost of capital for issuers willing to sacrifice "controlling shareholders' enjoyment of private benefits" in exchange for significant valuation premiums); cf. Jackson & Roe, Public and Private Enforcement of Securities Laws: Resource-Based Evidence 2 (Harv. Pub. Law, Working Paper No. 08-28, 2009) ("Allocating more resources to public enforcement is positively associated with robust capital markets, as measured by market capitalization, trading volume, the number of domestic firms, and the number of initial public offerings."), available at http://ssrn.com/abstract=1000086. Empirical evidence demonstrates that mandatory disclosure rules, antifraud rules, and insider trading prohibitions enforced by the SEC and private actors "serve to strengthen capital markets and encourage economic

development." Prentice, The Inevitability of a Strong SEC, 91 Cornell L. Rev. 775, 831-832 & 831 n.348 (2006). "Mandatory disclosure and antifraud provisions both contribute to share price accuracy and because both decrease costs and increase fairness for parties participating in capital markets, they also improve liquidity." *Id.*, at 832. In contrast, "[i]n an unregulated environment, gatekeepers are unreliable, and exchanges both suffer serious conflicts of interest and lack viable enforcement mechanisms to prevent most types of securities fraud." *Id.*, at 828; see also *United States* v. *O'Hagan*, 521 U.S. 642, 658 (1997) ("[I]nvestors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law.").

But that well-deserved and hard-earned reputation can only be maintained through consistent effort and sustained attention to rooting out fraud. And the Court has repeatedly noted the importance of private enforcement of §10(b) and rule 10b-5 as a mechanism for sustaining and channeling that effort. *E.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."); *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985) ("[Private rights of action] provide 'a most effective weapon in the enforcement' of the securities laws and are a 'necessary supplement to Commission action.'" (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964))). But as long and

painful experience has shown, where that necessary diligence and attention wane, fraud follows.

The successive and massive regulatory failures in America's securities markets in the past decade underscore the continued need for strong deterrence. The Court has been made well aware of the numerous frauds perpetrated by the likes of Enron, WorldCom, Tyco, Adelphia, and RefCo, and the direct involvement of secondary actors in those frauds. See, *e.g.*, Coffee, Understanding Enron, 57 Bus. Law. 1403, 1404-1405 (2002). But it is clear that the wave of massive securities fraud exposures heralded by the collapse of Enron did not wash away all of the market's bad actors—far from it.

More recently, fraud has emerged as a major concern in markets for mortgage-backed securities. Seemingly rampant misconduct and fraud in the mortgage servicing and securitization industries have led major banks to suspend foreclosure actions nationwide and attorneys general of all 50 states to open investigations into the integrity of foreclosures and the underlying mortgage lending practices. See Martin, All 50 States Start Inquiry into Foreclosures, N.Y. Times, Oct. 13, 2010, http://nyti.ms/cNQRww ("The inquiry will focus on signed affidavits that mortgage loan servicers have filed with the court without confirming their accuracy, a practice known as robo-signing."); see also Morgenson & Martin, Big Legal Clash on Foreclosure Is Taking Shape, N.Y. Times, Oct. 20, 2010, at A1 ("Banks routinely failed to record each link in the chain of documents that demonstrate ownership of a note. . . . Other record-keeping problems . . . involve endorsements, a process that occurs when notes are transferred and validated with a stamp to identify the institution that

bought it.") And federal regulators, including the SEC and the federal Financial Fraud Enforcement Task Force, have also taken notice. Westbrook, SEC Discussing Foreclosures with Other Regulators, Chairman Schapiro Says, Bloomberg News, Oct. 19, 2010, http://bit.ly/aJGxnO.

These actions have raised fears that potentially unenforceable—and hence worthless—instruments have infected the $2.8 trillion market for U.S. residential mortgage-backed securities, the largest investment asset class in the world. See Whelan & Simon, Mortgage Investors Are Set for More Pain, Wall St. Journal, Oct. 6, 2010, http://bit.ly/b1PdFc; Dennis & Cha, Reston-Based Company MERS in the Middle of Foreclosure Chaos, Wash. Post, Oct. 8, 2010, http://wapo.st/9f2knt ("To convince courts that they have the right to foreclose on homes, banks and lenders have often found it difficult—when challenged—to provide the paperwork showing they indeed own the loans."); Smith, Congressmen Attack LPS, Servicer Misconduct, Naked Capitalism, Oct. 1, 2010, http://bit.ly/a3jxSu ("[T]he problem of widespread failures to convey notes to the securitization trust isn't a 'technicality'; it means what were sold as [mortgage-backed securities] are potentially just unsecured consumer paper.").

Nor are poor mortgage servicing practices the sole concern: outright fraud on investors appears to have played a significant role in lenders' securitization of mortgage-backed investments in the last decade. See, *e.g.*, Gittelsohn & Shenn, Banks Face Two-Front War on Bad Mortgages, Foreclosures, Bloomberg News, Oct. 20, 2010, http://bit.ly/99KJUO ("Investors . . . contend that sellers are obligated to repurchase some mortgages because

of misrepresentations such as overstatements of borrowers' income or inflated appraisals."); Stempel, BofA Sues FDIC over Taylor Bean Mortgage Losses, Reuters, Oct. 20, 2010, http://reut.rs/bWsWw4 ("Bank of America . . . has sued [FDIC] over $1.75 billion of investor losses mainly from the 2009 collapses of a large regional bank and large mortgage lender. . . . Bank of America accused executives at Taylor Bean, Colonial and Platinum of having fraudulently schemed to 'double- and triple-pledge mortgages and steal assets' . . . ."); Bank of America's Reply to Objection, Dkt. No. 1559, *In re Taylor, Bean & Whitaker Mortg. Corp.*, No. 09-bk-07047-JAF, at 2 (Bankr. MD Fla. June 16, 2010) ("Indeed, it appears as though many loans and other mortgage-related assets have been double and even triple-pledged to various constituencies."). It appears that, quite predictably, securities fraud simply followed capital flows out of stocks and into the bubble in mortgage-backed securities that has been bursting in slow motion over the past two years.

Professor Bhide's assessment of the wellsprings of American securities markets' strength and liquidity and *Central Bank of Denver* both appeared in the same year, 1994. While that was mere happenstance, it is not clear that the same can be said for the fact that the parade of fraud-related investment scandals kicked off by Enron has coincided with a succession of steps, both legislative and judicial, that, by ever further restricting the viability of the private 10b-5 right of action, have eroded its value as a significant deterrent against securities fraud. See Coffee, Gatekeeper Failure and Reform, 84 B.U. L. Rev. 301, 318-321 (2004) (observing that the marked decrease in the risk of liability for secondary actors preceded and may have been a

causative factor in the investment frauds uncovered in the late 1990s and early 2000s). And though correlation need not imply causation, the consequence of further tightening the scope of primary liability to exclude secondary actors, or of effectively doing so by imposing an artificial attribution requirement to prove fraud-on-the-market reliance, is virtually certain. See Coffee, Law and the Market, *supra*, at 245-246. It would serve as an open invitation to fraud by secondary actors, and it would offer incentives to now-primary actors to shield themselves from potential future liability by manipulating the corporate form to artificially relabel themselves as exempt secondary actors.

II. Further Narrowing of Potential 10b-5 Fraud Liability Is Not Necessary to Prevent Strike Suits or Other Meritless Litigation.

Concerns about the prevalence of meritless securities litigation have for decades been invoked by this and lower courts as the primary rationale for ever-narrowing boundaries of securities fraud liability. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 n.33 (1976) (refusing to "significantly broaden the class of plaintiffs who may seek to impose liability . . . under the Acts" because "the inexorable broadening of the class of plaintiff . . . will ultimately result in more harm than good" (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 747-748 (1975))); *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 392 (CA5 2007) (insisting that, as the ultimate priority, "the rule of liability" must be construed "so as to avoid . . . '*in terrorem*

settlements' resulting from the expense and difficulty of, even meritoriously, defending this kind of litigation" (quoting *Hundahl* v. *United Benefit Life Ins. Co.*, 465 F.Supp. 1349, 1360 (ND Tex. 1979))). Such concerns are significantly diminished in light of post-*Central Bank* developments and so have lost their power to justify further narrowing the scope of primary liability under rule 10b-5, particularly at the risk of creating an easily manipulable safe harbor for fraud through an express attribution requirement. See *Randall*, 478 U.S., at 664 (declining to restrict §10(b) where the effect of doing so "would often be substantially to insulate those who commit securities frauds from any appreciable liability to defrauded investors" and so to diminish "the incentives for [securities market actors] to comply with the federal securities laws" by "seriously impair[ing] the deterrent value of private rights of action").

Congress and the courts have responded to these concerns effectively, by enacting legislation designed to curb litigation abuses and by wielding those new laws proactively to screen out potentially nonmeritorious cases, both frivolous and otherwise. The Private Securities Litigation Reform Act of 1995, for example, imposes heightened pleading requirements, mandates imposition of sanctions for frivolous litigation, provides a safe harbor for forward-looking statements, imposes restrictions on the selection and compensation of lead plaintiffs in securities class actions, limits recoverable damages and attorneys' fees, imposes a proportionate damages model, and permits staying of discovery pending resolution of motions to dismiss. See 15 U.S.C. §78u-4. The Securities Litigation Uniform Standards Act of 1998 (SLUSA) forecloses any opportunity to evade these restrictions by filing securities class actions in

state court. See 15 U.S.C. §78bb. And subsequent decisions have further heightened both the pleading and proof burdens that securities class action plaintiffs must bear. *E.g.*, *Stoneridge*, 552 U.S., at 160-161; *Tellabs*, 551 U.S. at 322-324; *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 547 U.S., at 84-85; *Dura Pharm.*, 544 U.S., at 345.

By most accounts, these efforts have been very successful. See Johnson *et al.*, Do the Merits Matter More? The Impact of the Private Securities Litigation Reform Act, 23 J.L. Econ. & Org. 627, 627 (2007) (noting that the PSLRA significantly improved the correlation of litigation to instances with hard evidence indicating fraud—accounting restatements and documented insider trading). Thus, the percentage of securities class actions alleging a claim under rule 10b-5 has fallen sharply and consistently since *Dura Pharmaceuticals*, from 91% in 2005 to only 66% in 2009. Cornerstone Research, Securities Class Action Filings 2009: Year in Review 26-27 (2010), http://bit.ly/8XaeUi. Only 1.8% of unique issuers listed on the NYSE, NASDAQ, or Amex exchanges were named as a defendant in a 2009 class action, well below even the 2.4% post-PSLRA average. *Id.*, at 10. Similarly, settlements in 2009 averaged only $37.2 million, below the post-PSLRA average of $55.4 million. Cornerstone Research, Securities Class Action Settlements: 2009 Review & Analysis 2 (2010), http://bit.ly/aIebaV. And the median 2009 settlement of a securities class action recovered only 2.3% of the plaintiffs' estimated damages, down from the historical 2.9% average from 2002 to 2008. *Id.*, at 5. Indeed, data suggests that these measures have perhaps been *too* successful. See Choi, Do the Merits Matter Less After the Private Securities Litigation Reform Act?, 23 J.L.

Econ. & Org. 598, 598 (2007) (noting that "evidence that the PSLRA increased the significance of merit-related factors in determining the incidence and outcomes of securities fraud class actions" is consistent with two hypotheses—that PSLRA "may have reduced solely the incidence of nuisance litigation," or that it "may have also reduced meritorious claims"—and concluding the latter is true).

The PSLRA, SLUSA, and subsequent case law developments, including *Stoneridge*, provide strong and adequate safeguards against strike suits. But responding to continued attacks on private enforcement of rule 10b-5 by further narrowing the scope of primary liability and raising additional hurdles to the imposition of liability for fraud risks transforming §10(b) into a mere paper tiger—jeopardizing the very features of American securities markets that have made them the most successful in the world. See Prentice, The Inevitability of a Strong SEC, *supra*, at 829-832; Coffee, Law and the Market, *supra*, at 245-246.

III. If Direct Attribution Is Required, Investment Advisers' Fiduciary Duty Demands They Ensure Accurate and Complete Attribution.

Even if express attribution were strictly demanded, investment advisers should be held, as a function of their fiduciary duty to mutual fund shareholders, to be required to ensure that their participation is fully, adequately, and expressly disclosed. "The Investment Advisers Act of 1940," as this Court has long held, "reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a

congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." *Sec. & Exch. Comm'n* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-192 (1963) (quoting 2 Loss, Securities Regulation 1412 (2d ed. 1961)). Unlike a claim based on an arm's-length transaction like those alleged in *Stoneridge*, the existence of a fiduciary duty alters the analysis. See *id.*, at 194.

At least one district court, faced with a post-*Stoneridge* instance of claimed primary liability by a secondary actor, has recognized that fact. See *Lopes* v. *Vieira*, 543 F.Supp.2d 1149, 1177-1178 (ED Cal. 2008) (noting that "liability of an attorney or law firm under Section 10(b) will depend on whether a duty to the investors exists"). The court sensibly reserved judgment on whether a secondary actor's liability can be premised on such a duty until the full contours of the duty could be explored in light of the facts of the case. See *ibid.* ("[T]he existence of a duty . . . will depend upon the facts . . . [and so] cannot be resolved at the pleading stage."). Unlike the attorney considered in *Lopes*, however, whose fiduciary duty may run only to his client and not to the investors, see Haft & Hudson, Liability of Attorneys & Accountants for Securities Transactions §3.2 (2007) (arguing on this basis that attorneys, unlike accountants, have no duty to disclose material facts to nonclient investors), an investment adviser's duty indisputably extends to the investors in the fund he advises. See *Capital Gains Research Bureau*, 375 U.S., at 194 (noting that an investment adviser's fiduciary duty may encompass "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to

employ reasonable care to avoid misleading his clients" (internal quotation marks omitted)).

Moreover, if express attribution is a requirement in order for investors to invoke the fraud-on-the-market theory of *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 242-244 (1988), recognition that investment advisers' fiduciary duty extends to disclosing or ensuring disclosure of their role in making statements would align that duty with the obligations of rule 10b-5 itself. If an actor's unattributed material participation in making statements is insufficient to establish reliance under the fraud-on-the-market theory, even where a reasonable investor would attribute the statements to the actor, attribution itself is then a material fact, the omission of which makes the statements misleading in light of the circumstances under which they were made, because its omission misleads the investors about the degree of the actor's purported nonparticipation in making the statements. See 17 C.F.R. §240.10b-5(b); *Capital Gains Research Bureau*, 375 U.S., at 186-187 (noting that "a fundamental purpose" of the securities laws is "to substitute a philosophy of *full disclosure* for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry" (emphasis added)).

CONCLUSION

The Court should reject petitioners' call to completely immunize secondary actors from primary liability by imposing a new requirement that, for reliance to be established under the fraud-on-the-market doctrine, bad actors must expressly attribute statements to themselves. The investing public would be ill-served by such rules, which would give perpetrators of fraud an easy way to insulate themselves from direct liability.

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AMICUS CURIAE BRIEF

No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP, INC. AND
JANUS CAPITAL MANAGEMENT LLC,
Petitioners,

v.

FIRST DERIVATIVE TRADERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Employees' Retirement System of the Government of the Virgin Islands (GERS) was created by the Third Legislature of the Virgin Islands on June 24, 1959, by Act 479, to provide a defined-benefit pension plan for officials and employees of the Government of the Virgin Islands, to provide retirement and disability annuities, and to provide other benefits for plan participants, their dependents, and beneficiaries. It is today one of the oldest pension systems under the American flag. Originally part of the Virgin Islands Division of Personnel, GERS has since 1987 operated as an independent quasi-governmental agency of the Government of the Virgin Islands.

GERS today serves more than 7,000 retirees and pensioners, and has over 11,000 active members. Its Fund Portfolio is managed with the specific goal of growing assets to meet its long-term pension liabilities and to ensure a reliable cash flow for funding near-term pension obligations. GERS is committed to a disciplined investment strategy that focuses on long-term results.

As an institutional investor, GERS has a strong interest in enforcement of the federal securities laws' anti-fraud provisions, and in the promulgation of legal-liability rules that operate both to ensure the

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[1] The parties consented to the filing of this *amicus* brief by filing on July 16 and on August 31, 2010, blanket consents to the filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part. No party or its counsel made any contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel has made a monetary contribution to the preparation or printing of this brief.

integrity of America's securities markets, and to provide relief whenever investors are victims of manipulative or deceptive conduct affecting their securities transactions.

SUMMARY OF ARGUMENT

Amicus curiae GERS endorses all that Respondent's brief says about a mutual-fund investment adviser's responsibility for any false statements that it makes concerning its own conduct and operation of the mutual funds it controls, to be included in the fund prospectuses that it in fact writes, files with the SEC, and disseminates to the public. This Court should reject the specious notion that the investment adviser's statements can be attributed only to the funds that it controls, which are themselves empty shells with no employees of their own to speak, write, or do anything.

Amicus curiae GERS seeks, however, to supplement Respondents' brief by helping to place §10(b)'s concept of "manipulative or deceptive" conduct within the context of the framing Congress' understanding of stock-market manipulation. Congress outlawed stock-market fraud and manipulation with the Securities Exchange Act of 1934, understanding that market prices may be subject to manipulation by false statements or rumors, by whomever made, and whether or not they are formally "attributed" to their authors. That understanding was reflected in legal scholarship of the time, and in the seminal decisions on market manipulation, with which §10(b)'s framers were surely familiar.

This Court holds "a §10(b) action can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or

deceptive device or contrivance' in connection with the purchase or sale of a security." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (Court's emphasis). It should reject Petitioners' invitation to let them escape liability for their own fraudulent statements merely because they claim they spoke falsely through the mutual funds that they wholly controlled and operated rather than in their own names.

ARGUMENT

I. *Stoneridge* Does Not Foreclose Reliance on Investment Advisers' False Statements About Their Own Policies and Actions Made for Filing with the SEC and Disseminated by Them to Investors in Prospectuses of the Mutual Funds They Operate

Petitioners say that under *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 188 (2008), the concept of market reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), somehow precludes showing reliance on misleading statements made by investment advisers about their own policies and conduct in the prospectuses of the mutual funds that they operate, absent formal "attribution" to the particular defendant. Yet *Basic* says nothing of the sort when it holds that since market prices generally reflect *all* publicly available material information from all sources, investors are entitled to rely upon "the integrity of the market" to be free from the effects of fraud or manipulation. *Id.* at 245.

Stoneridge, moreover, dealt with a very different question – the potential liability of Charter Communications, Inc.'s wholly independent suppliers and customers, whose commercial transactions Charter

accounted for improperly in its own financial statements, but that themselves "had no role in preparing or disseminating Charter's financial statements," and which *in their own* financial statements accounted properly for the transactions. *Stoneridge*, 552 U.S. at 155. Though the suppliers and customers were parties to business transactions that enabled Charter to issue false financial statements, agreeing even to backdate certain documents, "their deceptive acts were not communicated to the public." *Id.* at 159.

Section 10(b)'s "emphasis on a purchase or sale of securities," this Court observed, gave "some insight into the deceptive acts that concerned the enacting Congress," such that the "respondent's deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance." *Id.* at 160-61. *Stoneridge* thus holds that suppliers and customers whose business transactions were merely incidental precursors to a company's issuance of false financial statements do not themselves make those statements. It does not suggest that investment advisers who actually design, implement, and execute fraud through prospectuses of the mutual funds that they operate and control may escape liability by saying they acted in another's name, when their own deliberately deceptive conduct clearly was communicated to public markets and affected securities prices.

Here, JCM generated false statements describing its own policies and actions, placed them in prospectuses of the funds that it operated, filed them with the SEC, and disseminated them to the market. In this case, moreover, there can be no doubt that JCM's false statements affected the price of JCG stock, which fell precipitously upon disclosure of the truth. As shown below, these are precisely the kind of

"deceptive acts that concerned the enacting Congress" when it framed §10(b) in 1934. *Stoneridge*, 552 U.S. at 160. It is indeed hard to fathom how §10(b) could fail to catch the deliberately deceptive conduct alleged in this case, given JCM's active involvement at every step, and the inability of its captive funds, with no employees of their own, to say or do anything at all on their own.

II. Congress Intended §10(b) as a Broad Catch-All to Reach *Any* Person Engaged in *Any* Form of Deceptive Conduct Affecting Securities Prices

Petitioners and their *amici* give lip-service to the principle that §10(b) should be interpreted according to the natural meaning of its words, giving effect to Congress' intent in enacting it to proscribe fraudulent conduct. Yet they proceed to ignore both what §10(b) by its plain terms proscribes, and what Congress manifestly intended to cover with its blanket proscription making it "unlawful for *any* person, directly or indirectly, . . . [t]o use or employ, in connection with the purchase or sale of *any* security . . . *any* manipulative or deceptive device or contrivance." 15 U.S.C. §78j(b) (emphasis added).

This Court often has recognized that §10(b) was designed to be a "catchall" provision, proscribing all variety of fraudulent or deceptive conduct affecting securities transactions.[2] Its effective command is "'Thou shalt not devise any other cunning devices" that deceive investors or manipulate securities

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[2] *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1982) ("§10(b) is a 'catchall' antifraud provision").

prices.[3] This Court has said the provision's framers clearly intended a "'catch-all clause to prevent manipulative devices,'" both familiar and unfamiliar.[4] Thus, as this Court noted in *Superintendent of Ins. v. Bankers Life*, "'§10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.'"[5]

In light of §10(b)'s manifest purpose, this Court often has held that "'the statute should be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes."'"[6] This is reason enough to reject Petitioners' cramped and hypertechnical construction of the statute and rule, which would permit investment advisers controlling mutual

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[3] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202-03 (1976) (quoting *Hearings on H.R. 7852 and H.R. 8720 before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess., 115 (1934)).

[4] *Hochfelder*, 425 U.S. at 203; *see also Aaron v. SEC*, 446 U.S. 680, 690-91 (1980).

[5] *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 11 n.7 (1971) (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967) (emphasis in original)).

[6] *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963))); *accord, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1982) ("we have repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes'") (quoting *Capital Gains Research Bureau*, 375 U.S. at 195).

funds having no employees or assets of their own to make deliberately false statements in the funds' names – without facing liability under §10(b).

A. Section 10(b) Specifically Targets All Deliberately Deceptive Conduct Affecting Securities Prices

Section 10(b) has limits, of course. "Section 10(b) is aptly described as a catchall provision," this Court observed in *Central Bank*, "but what it catches must be fraud."[7] Yet an action for fraud or deceit typically lies whenever words or conduct are employed to mislead another to his or her detriment – no matter how the deception is in fact accomplished.[8] And fraud is precisely what the Respondent's complaint describes when it alleges that JCM deliberately framed false statements for dissemination to the public, thereby deliberately deceiving investors, and affecting the price at which Janus Capital Group stock traded.

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[7] *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 174 (1994) (quoting *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980)).

[8] *See Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (1888) ("The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendants, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."); *Pasley v. Freeman*, 3 Term. Rep. 51, 64, 100 Eng. Rep. 450, 457 (King's Bench 1789) (per Lord Kenyon, Ch. J.: "'an action upon the case for a deceit lies when a man does any deceit to the damage of another'") (quoting Lord Ch. B. John Comyns, *Digest of the Laws of England*).

Such conduct lies *at the very core* of what Congress sought to reach with §10(b)'s proscription of "any manipulative or deceptive device or contrivance." 15 U.S.C. §78j(b). For it involves both deliberate deception, framing false statements to be disseminated to the public, and a resulting manipulation of JCM's parent corporation's securities' prices, with the deliberately false statements "artificially affecting the price of [those] securities."[9]

Describing the "Necessity for Regulation" in Exchange Act §2, Congress observed that market transactions establishing securities' prices may be subject to any variety of manipulative or deceptive practices, and declared that the Exchange Act is "to insure the maintenance of fair and honest markets."[10] Section 2(2) states that "[t]he prices established and offered in such transactions are generally disseminated and quoted throughout the United States," and that they "constitute a basis for determining and establishing the prices at which securities are bought and sold."[11] "Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control," Congress added in §2(3), warranting regulations requiring both the full disclosure of truthful information by securities issuers, and also a blanket proscription of fraud and manipulation by whomever it might be practiced.[12] Section 10(b) thus makes it unlawful "for *any* person," not just securities issuers, and not just those who disclose their identities or take responsibility for their

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[9] *Ernst & Ernest v. Hochfelder*, 425 U.S. 185, 199 (1976).

[10] 15 U.S.C. §78b.

[11] 15 U.S.C. §78b(2).

[12] 15 U.S.C. §78b(3).

conduct, "directly or indirectly . . . [t]o use or employ, in connection with the purchase of *any* security . . . *any* manipulative or deceptive device or contrivance" that contravenes SEC rules. 15 U.S.C. §78j(b) (emphasis added).

The Exchange Act's legislative history confirms the understanding, expressed in §2, that "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market," provided, of course, that true information indeed is disclosed.[13] And Congress clearly intended that investors should be entitled to rely on *the integrity* of the prices thus established. *See Basic Inc. v. Levinson*, 485 U.S. 224, 240-47 (1988).[14]

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[13] H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 11 (1934), *reprinted in* 5 Ellenberger & Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 18.

[14] Though *Basic* does not mention it, Congress directly addressed the element of reliance with the Exchange Act's amendment inserting an express reliance requirement for certain claimants under §11 of the Securities Act of 1933, expressly specifying that "such reliance may be established without proof of the reading of the registration statement." Securities Exchange Act of 1934 §206(a), 48 Stat. 907, amending Securities Act §11(a), codified at 15 U.S.C. §77k(a), states:

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, *but such reliance*

"In drafting [the Exchange] Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance *on the integrity of those markets*," this Court observed in *Basic*, quoting from the House Report:

> "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value."[15]

Notably, the focus here is on the integrity of market prices established on the basis of *all* available material information from *all* sources. "Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-

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may be established without proof of the reading of the registration statement by such person.

15 U.S.C. §77k(a) (emphasis added); *see also* H.R. Rep. No. 1838, 73d Cong. 2d Sess., at 41 (1934) (Conference Report), *reprinted in* 5 Ellenberger & Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 20.

[15] *Basic*, 485 U.S. at 246 (emphasis added) (quoting H.R. Rep. No. 1383, at 11 [*reprinted in* 5 Ellenberger & Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 18]).

developed markets reflects *all* publicly available information, and, hence, *any* material misrepresentations," whatever their source might be (and whether or not their authors take credit for them).[16] There can be little doubt, then, that the false statements that JCM placed in the fund portfolios that it framed and disseminated were reflected in the stock price of its publicly-traded parent, Janus Capital Group.

"An investor who buys or sells stock at the price set by the market," this Court concluded in *Basic*, "does so in reliance on the integrity of that price."[17] "Because most publicly available information is reflected in market price, an investor's reliance on *any* public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[18]

B. Legal Scholarship with Which §10(b)'s Framers Were Familiar Indicated that Parties Other than a Securities Issuer May Be Liable for Misleading Statements or Conduct Affecting Securities Prices in the Open Market

Congress' understanding of stock-market fraud and manipulation doubtless was grounded in the influential scholarship of the era's greatest authority on

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[16] *Basic*, 485 U.S. at 246 (emphasis added).

[17] *Id.* at 247.

[18] *Id.* (emphasis added); *see also id.* at 246 n.24 ("For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."); *id.* at 248 n.28 (the presumption of market reliance does not depend on "any particular theory of how quickly and completely publicly available information is reflected in market price").

corporate finance and securities markets, Professor A.A. Berle of the Columbia University School of Law.[19] That scholarship supported liability of third parties.

Professor Berle's 1931 article on *Liability for Stock Market Manipulation* laid out the fundamentals of what this Court embraced in *Basic* as the "fraud on the market" theory of reliance, under which investors may rely upon stock market prices to reflect all available information, whether provided by a security's issuer, or by third parties, or even self-styled "secondary actors." Professor Berle wrote that "all markets move in a nexus of information gathered from all sources and circulated in a variety of ways, recognized and unrecognized."[20]

Thus, if a publicly traded company issues false statements affecting the price of its securities, "any purchaser in the market would seem to have an action in deceit or fraud for damage suffered therefrom."[21] But the principle, as it was understood in

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[19] *See generally* Adolph A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931); *see also* Adolph A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 393-394, & nn.3-6, 395-97, 399-400 (1938).

[20] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 268.

[21] *Id.* at 268-69 (footnotes omitted). "If the X corporation states that its earnings are $13 a share when, in fact, its income statement should really show a loss, and the market estimates the value of the stock at $130 on the basis of such statement, and the investor buys at the market price, he has relied on the market situation, which in turn resulted from the false statement." *Id.* at 269-70. "Writing in 1931, Adolf Berle, probably the era's most influential commentator on corporate finance, asserted that courts had already gone much further than [is] commonly assumed to protect the stock market from fraud."

the 1930s, clearly applied to others besides securities issuers:

> In like manner, if an outsider circulates a false report as to the earnings of a particular corporation which affects the price of its stock thereby subserving his own concealed interest, relief may be had against him by any person buying or selling in the market, where it appears that the report was designed to affect the market. It may be asked if this is a variation of the common law rule that the statement must be intended to be relied upon. Obviously not; for while the maker of the false representation has not singled out a specific individual for his victim, he has tossed his squib into a crowd, one or many of whom may be hit; and this fact is, or at least should be, known to him.[22]

Though Petitioners would have this Court draw arbitrary distinctions between securities issuers and others, those distinctions obviously have no basis either in statutory text flatly proscribing manipula-

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Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 407 n.96 (1990). In their 1932 landmark *The Modern Corporation and Private Property*, Professors Adolph A. Berle, Jr., and Gardiner C. Means restated the basics of fraud-on-the-market reliance in market-manipulation cases. *See* Aldoph A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* 314 & n.1, 322 (New York: The MacMillan Co., 1932). Thus, "if a corporation consciously overstated its income leading to a rise in the value of the shares, a buyer on the faith of such valuation should have no greater difficulty in recovering" than would an investor to whom false statements were directly made. *Id.* at 322.

[22] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 269-70.

tion and deception practiced by "any person," or in the market-fraud and manipulation principles underlying that text. This Court thus emphasized in *Central Bank* that

> absence of §10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.

Central Bank, 511 U.S. at 191 (Court's emphasis).

"In any complex securities fraud" this Court observed, "there are likely to be multiple violators . . . ." *Id.* "In a prospectus-liability case," Petitioners counter, "the only one 'us[ing] or employ[ing] *anything* is the issuer – the company that, through the prospectus, is offering its securities for sale – and thus the issuer is the only one covered by Section 10(b)." Pet. Brf. at 37-38. Yet this is plainly false. The precedents show that many besides the issuer may be liable for false statements in offering documents – its accountants for example – provided only that they made misleading statements with the required scienter, on which investors and the market may then rely.[23]

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[23] *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983); *see also McGann v. Ernst & Young*, 102 F.3d 390, 397 (9th Cir. 1996); *Fine v. American Solar King*, 919 F.2d 290, 294-300 (5th Cir. 1990).

C. The Seminal Precedents on Market Manipulation, with Which §10(b)'s Framers Were Familiar, Support Liability of Non-Issuer Third Parties for Misleading Statements Even if Issued Anonymously or Attributed to Others

Petitioners nonetheless insist there can be *no reliance* unless misinformation is formally "attributed" to its authors. Yet it is far from apparent why attribution would be required before those who generate and distribute misinformation may be held accountable for deceptive conduct that clearly affected securities prices. The market-manipulation precedents with which Congress was familiar indicate that formal attribution was not needed.

When Congress outlawed "any manipulative or deceptive device or contrivance," the seminal decision on market manipulation was *Rex v. De Berenger*,[24] an English case that this Court had cited favorably when it ruled bid-rigging agreements are against public policy in *McMullen v. Hoffman*,[25] and that figured prominently in early 1930s American market-manipulation precedent,[26] which in turn has informed this Court's understanding of the manipulative devices proscribed by the Exchange Act.[27]

The defendants in *De Berenger* were convicted of criminal conspiracy for spreading false rumors on

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[24] 3 Maule & Selwyn 67, 105 Eng. Rep. 536, [1814-1823] All E.R. Rep. 513 (King's Bench 1814).

[25] 174 U.S. 639, 649 (1899).

[26] *See, e.g., United States v. Brown*, 5 F. Supp. 81, 85-88 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935).

[27] *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 (1985) (quoting *Brown*, 5 F. Supp. at 85).

February 19, 1812, that Napoleon Bonaparte had died, thus "unlawfully contriving, etc. by false reports, rumours, arts, and contrivances," to induce the public to think that peace with France was imminent.[28] This caused "a great increase and rise in the government funds and government securities" of the United Kingdom – to the injury of all "who should on February 21 [1812] purchase and buy any part or parts, and share or shares of and in the public government funds."[29]

In words that this Court repeated in *McMullen*, Lord Ellenborough declared that such conduct "'strikes at the price of a vendible commodity in the market, and if it gives a fictitious price by means of false rumours it is a fraud leveled against all the public, for it is against all such as may possibly have anything to do with the funds on that day.'"[30] The King's Bench was unanimous in so holding.[31]

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[28] *Id.*, 3 Maule & Selwyn at 68, 105 Eng. Rep. at 537 (syllabus).

[29] *Id.*

[30] *McMullen*, 174 U.S. at 649 (*quoting De Berenger*, 3 Maule & Selwyn at 72-73, 105 Eng. Rep. at 538) (Lord Ellenborough Ch. J.)); *see also Brown*, 5 F. Supp. at 85-86 (similarly quoting *De Berenger*); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 187-88 (1871) ("In *Rex v. De Berenger*, 3 M. & S. 67, it was held to be a conspiracy to combine to raise the public funds on a particular day by false rumors. The purpose itself, said Lord Ellenborough, is mischievous – it strikes at the price of a valuable commodity in the market, and if it gives a fictitious price by means of false rumors, it is a fraud leveled against the public, for it is against all as may possibly have anything to do with the funds on that particular day.").

[31] Justice LeBlanc agreed that the "object was to injure all those who should become purchasers on that day, and not some individuals in particular." *De Berenger*, 3 Maule & Selwyn at

Notably, the acts of fraud and manipulation in *De Berenger* were perpetrated not by any security's issuer, but by third parties – mere "secondary actors" in Petitioners' preferred lexicon. Moreover, it should be apparent that secondary actors who disseminate false rumors may well choose to attribute the misinformation they spread to some other "reliable source" rather than to themselves. Indeed, in a case like *De Berenger* itself, the more effectively the purveyors of deception concealed the fact that false information had originated with them, the more effective their fraud might be.

With *De Berenger* the seminal decision, it becomes clear that the founding paradigm of market fraud and manipulation involves misinformation generated by parties other than the securities' issuer and attributed to sources other than themselves. Petitioners' arguments for demanding limited (or no) liability for "secondary actors," and for eliminating liability absent "attribution" to the deception's authors, accordingly founder on first principles.

74, 105 Eng. Rep. at 539 (LeBlanc, J.). Justice Bayley declared that deceptive conduct affecting the prices at which securities trade "will certainly prejudice a large portion of the King's subjects who have occasion to purchase on that day," its "necessary consequence" being "to prejudice all those who become purchasers during the period of that fluctuation." *Id.*, 3 Maule & Selwyn at 75, 105 Eng. Rep. at 539 (Bayley, J.). Justice Dampier recited the charge, "that the defendants by false rumours conspired to give a temporary rise to the funds of this Kingdom, in order to deceive those persons who should purchase into the funds on a particular day," and then summed up: "The means used are wrong, they were false rumours, the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." *Id.*, 3 Maule & Selwyn at 76-77, 105 Eng. Rep. at 540 (Dampier, J.).

From false rumors influencing securities' prices, it was but a step to deceptive *transactions* designed to affect market prices by creating the false appearance of active trading, an issue addressed in the 1892 Queen's Bench decision of *Scott v. Brown, Doering, McNab & Co.*,[32] which this Court cited favorably in *McMullen*,[33] and which figured prominently in the leading 1930s market-manipulation precedent *United States v. Brown*.[34]

As this Court itself observed in *Schreiber*, the "seminal English case of *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724 (C.A.), which broke new ground in recognizing manipulation could occur without the dissemination of false statements," was one that nevertheless "placed emphasis on the presence of deception" created by the appearance of active trading in the market. *Schreiber*, 472 U.S. at 7 n.4. "As Lord Lopes stated in that case, 'I can see no substantial distinction between false rumours and false fictitious acts.'"[35] "'[Even] a speculator is entitled not to have any present fact involving the subject matter of his speculative purchase or the price thereof misrepresented by word or act.'"[36]

The concept of manipulation thus came to include not just misleading statements and rumors, as in *De*

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[32] [1892] 2 Q.B. 724, 730, 61 L.J. (N.S.) 738, 741 (C.A.).

[33] 174 U.S. at 649.

[34] *Brown*, 5 F. Supp. at 87; *cf.* Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 395-96 (discussing "the now famous case of *United States v. Brown*").

[35] *Schreiber*, 472 U.S. at 7 n.4 (quoting *Scott v. Brown*, [1892] 2 Q.B. at 730 (Lord Lopes)).

[36] *Schreiber*, 472 U.S. at 7 n.4 (quoting *Brown*, 5 F Supp. at 85) (*Schreiber's* brackets).

Berenger, but also "practices such as wash sales, matched orders, or rigged prices *that are intended to mislead investors* by artificially affecting market activity,"[37] and that Exchange Act §9 and §10(b) together proscribe.[38]

It should be apparent, again, that many market-manipulation scams outlawed by §10(b) are apt to be more effective the better their perpetrators can hide their identities. A "wash sale," for example, is an ostensible market transaction in which a security's owner has in truth merely "sold shares on the stock exchange to himself," while with "matched orders" the "conspirators shuttle stock back and forth between each other" to produce market quotations and the appearance of active trading.[39] Public disclosure of the participants' identities would disclose the transactions' character, thereby defeating the deception. "Indeed," this Court has observed, "nondisclosure is usually essential to the success of a manipulative scheme."[40]

Clearly then, one need not know the identity of those behind deceptive transactions and statements to rely on the integrity of the market prices established by the manipulative or deceptive conduct that §10(b) proscribes. Absence of formal attribution should be entirely beside the point when misinformation is deliberately transmitted to the market.

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[37] *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977) (emphasis added).

[38] *See* Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 398-400.

[39] Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 394-95.

[40] *Santa Fe*, 430 U.S. at 477.

C. Petitioners Cannot Avoid Liability for the Statements that JCM Made Through Prospectuses of the Mutual Funds It Operated

"The meaning the Court has given the term 'manipulative' is consistent with the use of the term at common law, and with its traditional dictionary definition." *Schreiber*, 472 U.S. at 7. We have seen that the seminal market-manipulation precedents, with which §10(b)'s framers were undoubtedly familiar, involved statements by third parties attributing false information to others, as in *De Berenger*, *see supra* at 15-17, and deceptive transactions where the participants' identities were necessarily concealed, as in both *Scott v. Brown* and *United States v. Brown*, *see supra* at 18-19.

The notion that reliance on *the integrity of the market*, to be free from the effects of manipulation and deceit, may exist only if those who manipulate it disclose their identities and roles, thus is one that has no sound theoretical basis. This should be fatal to Petitioners' contentions that they can face no liability for false statements that they generated and disseminated but did not "attribute" to themselves. For *the market* clearly relied on the statements.

Investors were entitled to rely upon the integrity of prices established by JCM's false statements, even though they were communicated to the market through fund prospectuses, and whether or not JCM formally took credit for them. As the Fourth Circuit rightly concluded, everyone knew that JCM, as the funds' investment adviser, was at all events responsible for generating the misleading description of its own policies and conduct. Pet. App. 16a-18a.

CONCLUSION

Petitioners offer no valid basis for escaping liability for their conduct which was designed to, and did, mislead investors and the market. The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-525

IN THE
Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,
Petitioners,

v.

FIRST DERIVATIVE TRADERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF JOHN P. FREEMAN AND JAMES D. COX AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amicus John P. Freeman is the John T. Campbell Chair in Business and Professional Ethics Emeritus, and the Distinguished Professor of Law Emeritus, at the University of South Carolina School of Law. He has been analyzing and writing about legal issues affecting the mutual fund industry for more than 40 years. His major mutual fund publications include: John P. Freeman et al., *Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test*, 61 Okla. L. Rev. 83 (2008); John P. Freeman, *The Mutual Fund Distribution Fee Mess*, 32 J. Corp. L. 739 (2007); John P. Freeman & Stewart L. Brown, *Fund Advisory Fees: The Cost of Conflicts of Interest*, 26 J. Corp. L. 610 (2001); John P. Freeman, *The Use of Mutual Fund Assets to Pay Marketing Costs*, 9 Loyola U. Chi. L.J. 533 (1978); John P. Freeman, *Marketing Mutual Funds and Individual Life Insurance*, 28 S.C. L. Rev. 1 (1976); Student Survey, *The Mutual Fund Industry: A Legal Survey*, 44 Notre Dame L. Rev. 732 (1969) (co-author). Professor Freeman has consistently spoken out about the duties that mutual fund advisers owe to fund shareholders and the funds that the advisers indisputably dominate and control, and he has commented on SEC rule proposals. He also testified before Congress on mutual fund regulatory issues. *See Oversight Hearing on Mutual Funds:*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represents that all parties have consented to the filing of this brief, and letters reflecting their blanket consent to the filing of *amicus* briefs have been filed with the Clerk.

Hidden Fees, Misgovernance and Other Practices that Harm Investors: Hearing Before the Subcomm. on Fin. Mgmt., the Budget, and Int'l Sec. of the S. Comm. on Governmental Affairs, 108th Cong. 70-72, app. at 266-75 (2004) (statement of John P. Freeman).[2] In addition, Professor Freeman's scholarship triggered the New York Attorney General's investigation into the mutual fund industry that ultimately uncovered the market-timing and late-trading scandals. *See* Brooke A. Masters, *Spoiling for a Fight: The Rise of Elliot Spitzer* 133-35 (2006) (discussing the role of Professor Freeman's 2001 article in the Journal of Corporation Law in inspiring the Office of the New York Attorney General to investigate the mutual fund industry); Henny Sender & Gregory Zuckerman, *Behind the Mutual-Fund Probe: Three Informants Opened Up*, Wall St. J., Dec. 9, 2003 (same).[3] Professor Freeman's curriculum vitae is available at http://www.law.sc.edu/faculty/freeman/cv.pdf.

Amicus James D. Cox is the Brainerd Currie Professor of Law at Duke University School of Law. He has also taught law at the Hastings College of Law at the University of California, Stanford Law School, the University of San Francisco School of Law, and Boston University School of Law. Professor Cox is co-author of a leading treatise on corporate law and a leading casebook on securities regulation. *See* James D. Cox & Thomas L. Hazen, *Cox & Hazen on Corporations: Including Unincorporated Forms of Doing Business* (2d ed. 2003); James D. Cox et al., *Securi-*

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[2] Available at http://www.access.gpo.gov/congress/senate/pdf/108hrg/92686.pdf.

[3] Available at http://www.latrobefinancialmanagement.com/Research/Money_Management/Behind%20the%20Mutual-Fund%20Probe.pdf.

ties Regulation: Cases and Materials (6th ed. 2009). Professor Cox has been analyzing and writing about issues involving corporate governance and securities regulation for over 35 years, including issues affecting the mutual fund industry. Examples of such articles include: James D. Cox et al., *Lying and Getting Caught: An Empirical Study of the Effect of Securities Class Action Settlements on Targeted Firms*, 158 U. Pa. L. Rev. 1877 (2010); James D. Cox, *Coping in a Global Marketplace: Survival Strategies for a 75 Year-Old SEC*, 95 Va. L. Rev. 941 (2009); James D. Cox et al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions? Doctrinal and Empirical Analyses*, 2009 Wis. L. Rev. 421 (2009); James D. Cox & John W. Payne, *Mutual Fund Expense Disclosures: A Behavioral Perspective*, 83 Wash. U. L.Q. 907 (2005); James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 Notre Dame L. Rev. 893 (2005); James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 Duke L.J. 737 (2004); James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors With Independent Counsel*, 48 Vill. L. Rev. 1077 (2003). Professor Cox has testified before Congress on securities-regulation issues on several occasions. *See, e.g., The Insider Trading Proscriptions Act of 1987: Hearings on S. 1380 Before the Subcomm. on Sec. of the S. Comm. on Banking, Housing, and Urban Affairs*, 100th Cong. 78-83 (1987) (statement of James D. Cox),[4] *Illegal Insider Trading: How Widespread Is the Problem and Is There Adequate Criminal Enforcement?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong.

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[4] Available at http://www.archive.org/stream/insidertradingp00secugoog#page/n0/mode/1up.

17-18, 77-87 (2007).[5] Professor Cox's curriculum vitae is available at http://www.law.duke.edu/fac/cox/cv.

Professors Freeman and Cox have over 70 years of combined experience teaching about corporate governance practices and SEC compliance issues, including those related to the preparation and filing of registration statements. As close observers and students of the mutual fund industry, they have a thorough understanding of the industry's structure and management practices. In addition, Professors Freeman and Cox served as disinterested mutual fund directors for the First Phoenix Fund, Inc. This service informs their perspective on the issues in this case.

INTRODUCTION

Petitioner Janus Capital Management LLC (JCM) is the investment adviser to the Janus family of mutual funds (Janus Funds). Petitioner Janus Capital Group Inc. is JCM's publicly traded parent corporation. Petitioners repeatedly characterize JCM as a mere "service provider" to the Janus Funds and downplay JCM's role with respect to the Funds' registration statements.[6] Petitioners also characterize the Fourth Circuit's opinion below as an unauthorized and unnecessary expansion of liability under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b). These characterizations are at complete odds with practical reality.

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[5] Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:31445.pdf.

[6] The registration statements include the Funds' prospectuses and statements of additional information. *See Registration Form Used by Open-End Management Investment Companies*, SEC Release No. 33-7512, 63 Fed. Reg. 13,916 (Mar. 13, 1998).

Like other mutual fund advisers, JCM is no mere "service provider" to the funds it controls, and JCM did much more than "help draft" the Janus Funds' misleading registration statements. JCM was fully responsible for the registration statements, which described JCM's activities and which JCM used to market fund shares to potential investors. Affirming the Fourth Circuit's opinion below would not expand § 10(b) liability. Rather, *amici* herein urge this Court to recognize this case for what it is: a claim against a primary actor for making misleading statements in a registration statement for which it was responsible and which the investing public would attribute to it.

SUMMARY OF ARGUMENT

The mutual fund industry's structure is unique. Unlike other businesses, mutual funds typically have no employees of their own and are controlled by external investment advisers who set them up and manage their day-to-day business affairs, including preparing registration statements to market shares of the funds to potential investors, all in an effort to profit from charging advisory and other fees to the funds' shareholders. The control advisers exert over their funds is widely recognized by lawmakers, courts, regulators, and commentators. In addition, publicly filed documents and discovery in this case confirm that JCM was responsible for preparing the registration statements at issue, and the SEC has already determined that JCM was responsible for the misrepresentations contained in the registration statements. Accordingly, the investing public would attribute the registration statements to JCM. Indeed, there is no one else to whom the investing public *could* attribute the registration statements. Furthermore, because JCM was responsible for the

registration statements, Respondent's claim is a claim against a primary actor that would require no expansion of § 10(b) liability. Indeed, Respondent's claim represents a necessary and otherwise unavailable remedy against investment advisers who defraud their own shareholders by making misrepresentations in the registration statements for the funds they control.

ARGUMENT

I. MUTUAL FUND ADVISERS ARE NO MERE "SERVICE PROVIDERS" TO THE FUNDS THEY CONTROL

Mutual funds have a unique management structure and do not function like normal businesses. Instead of being operated by internal management, mutual funds are operated by external investment advisers who have de facto control over the funds. *See* John P. Freeman et al., *Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test*, 61 Okla. L. Rev. 83, 87 (2008). The relationship between an investment adviser and the funds it controls is thus fundamentally different than the funds' relationship with service providers such as lawyers, accountants, and banks (e.g., custodians). Unlike these traditional secondary actors,[7] fund advisers are in charge of the day-to-day operations of the funds. In fact, mutual funds typically have no employees or offices themselves; instead, the adviser furnishes all employees and facilities necessary for the adviser to carry out the funds' daily operations. *See* Investment Company Institute, *2010 Investment Company Fact*

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[7] *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (identifying "lawyer[s], accountant[s], [and] bank[s]" as secondary actors).

Book app. A, at 189 (2010) ("Unlike other companies, ... a mutual fund is typically externally managed; it is not an operating company and it has no employees in the traditional sense.") To be sure, there is a contractual relationship between the adviser and the funds, and a comprehensive set of regulations exists to ameliorate conflicts of interest inherent in this relationship. But this legal regime does not eliminate the conflicts of interest, nor does it obscure the practical reality that the adviser controls the funds. In fact, the legal regime exists for the very reason that mutual funds are not self-effectuating entities in any real sense. And advisers' control over the funds they manage is well known and understood by lawmakers, courts, regulators, and commentators.

A. Congress

Congress enacted the Investment Company Act to mitigate the conflicts of interest inherent in the relationship between investment advisers and their captive mutual funds. A critical premise of the Act and its 1970 amendments is that mutual funds are not in any practical sense independent from the advisers that create and operate them. The Senate Committee on Banking and Currency elaborated on this concept in reporting on what would ultimately become the 1970 amendments to the Act:

> Mutual funds, with rare exception, are not operated by their own employees. Most funds are formed, sold, and managed by external organizations, that are separately owned and operated. These separate organizations are usually called investment advisers. The advisers select the funds' investments and operate their businesses. ....

> Because of the unique structure of this industry the relationship between mutual funds and their investment advisers is not the same as that existing between buyers and sellers or in conventional corporate relationships. Since a typical fund is organized by its investment adviser which provides it with almost all management services and because its shares are bought by investors who rely on that service, a mutual fund cannot, as a practical matter server its relationship with the adviser.

S. Rep. No. 91-184, at 5 (1969), *reprinted in* 1970 U.S.C.C.A.N 4897, 4901. This premise has since informed this Court's decisions involving the Investment Company Act.

B. This Court and Other Federal Courts

This Court acknowledged the practical non-severability of the relationship between mutual funds and their advisers over thirty years ago. *See Burks v. Lasker*, 441 U.S. 471, 480-81 (1979) (quoting S. Rep. No. 91-184, at 5). And this Court has since continued to recognize the attendant control advisers exert over their funds. In *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984), the Court observed: "Unlike most corporations, [a mutual fund] is typically created and managed by a pre-existing external organization known as an investment adviser ... [that] generally supervises the daily operations of the fund ...." 464 U.S. at 536 (citing *Burks*, 441 U.S. at 481). Just recently, this Court echoed that observation, stating that the investment adviser typically "creates the mutual fund, ... selects the fund's directors, manages the fund's investments, and provides other

services." *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010).

The Second Circuit, home to a large portion of the mutual fund industry, has also recognized that "[c]ontrol of a mutual fund ... lies largely in the hands of the investment adviser." *Tannenbaum v. Zeller*, 552 F.2d 402, 405 (2d Cir. 1977). As the Second Circuit has explained, "[a] mutual fund is a 'mere shell,' a pool of assets," whose management "is largely in the hands of an investment adviser, an independent entity which generally organizes the fund and provides it with investment advice, management services, and office space and staff." *Id.* In addition to providing investment advice, the adviser "operates or supervises most of the other phases of the fund's business." *Id.* Judge Posner of the Seventh Circuit has also acknowledged the "captive" nature of the typical adviser-fund relationship. *See Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 731 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc) ("And there is no doubt that the captive funds are indeed captive.").

C. The SEC

The SEC, the agency responsible for regulating the mutual fund industry, has long held the view that investment advisers control their funds. As the SEC reported to Congress in 1966, "mutual funds are formed by, and generally remain under, the effective control of their advisers." *Report of the SEC on the Public Policy Implications of Investment Company Growth*, H.R. Rep. No. 89-2337, at 12 (1966) [hereinafter *SEC Report*]; *see also id.* at 74 ("Although the funds are legally separate entities, they are under the effective control of their advisers and principal underwriters."). The SEC recognized that there is a

"virtually complete merger" between mutual funds and their advisers, *id.* at 126-27, and that mutual funds are "without an identity and an organization separate from [their advisers]," *id.* at 74. At the 1967 hearings before the Senate on proposed amendments to the Investment Company Act, SEC Chairman Manuel Cohen made the following remarks in response to testimony by industry witnesses:

> They [industry witnesses] also made the point that the investment adviser creates the fund, and operates it in effect as a business. Many of them stated that "It is our fund, we run it, we manage it, we control it," and I don't think there is anything wrong with them saying it. They were just admitting what is a fact of life. The investment adviser does control the fund.

Investment Company Act Amendments of 1967: Hearings on H.R. 9510 and H.R. 9511 Before the Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce, 90th Cong. 674 (1968) (statement of Manuel F. Cohen, Chairman, SEC).

The SEC has continued to espouse the view that investment advisers control their mutual funds. In a 1977 Investment Company Act Release, the SEC stated that "the term 'investment adviser' is to some extent a misnomer. ... The so-called 'adviser' is no mere consultant. ... [T]he investment adviser almost always controls the fund." *In re Steadman Sec. Corp.*, Exchange Act Release No. 13695, Investment Company Act Release No. 9830, Investment Advisers Act Release No. 593, 46 S.E.C. 896, 920 n.81 (June 29, 1977) (citation omitted). In fact, the SEC found that, because the investment adviser "manages the

fund's affairs and ... is normally the only audible voice in day-to-day management," the investment adviser's status as such "is normally enough in itself" to establish control under the Investment Company Act. *See id.* And the SEC has advanced its view that advisers control their funds before this Court for over twenty-five years. *See* Brief for the SEC as Amicus Curiae in Support of Affirmance at 10, *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984) (No. 82-1200) ("[T]he adviser of an investment company typically exercises at least as much control over the company as internal management does in other corporations."); U.S. Cert. Br. 8-10.

D. Commentators

Observers of the mutual fund industry have written extensively about the unique external management structure of mutual funds and the control advisers exert over the funds they manage. *See, e.g.*, John P. Freeman et al., *Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test*, 61 Okla. L. Rev. 83, 87-89 (2008); Lyman Johnson, *A Fresh Look at Director "Independence": Mutual Fund Fee Litigation and Gartenberg at Twenty-Five*, 61 Vand. L. Rev. 497, 504 (2008) ("For the most part, the investment adviser runs the company and, for a variety of reasons, stands in a dominant and controlling position with respect to the fund."); Donald C. Langevoort, *Private Litigation To Enforce Fiduciary Duties in Mutual Funds: Derivative Suits, Disinterested Directors and the Ideology of Investor Sovereignty*, 83 Wash. U. L.Q. 1017, 1031-32 (2005); John P. Freeman & Stewart L. Brown, *Mutual Fund Advisory Fees: The Cost of Conflicts of Interest*, 26 J. Corp. L. 609, 614-18 (2001); John C. Bogle, *Bogle on Mutual Funds* 300 (1994) ("Ordinary corporations do

not need to go out and hire other corporations, with separate owners, to manage their affairs. Mutual funds do precisely that ....")

An adviser's control over a fund it manages starts at the fund's inception and is strong and enduring. As one early observer explained:

> The fund is conceived by a bunch of people whom we call advisers or managers. ... This group gives birth to the fund. The fund is manned by the advisers. If I may carry this figure of speech, the umbilical cord is never cut after birth, as would be true in ordinary biological life.

University of Pennsylvania Law School Conference on Mutual Funds, *The Mutual Fund Management Fee*, 115 U. Pa. L. Rev. 726, 739 (1967) (statement of Abraham L. Pomerantz); *see also* Freeman & Brown, *supra*, at 615 ("The external manager typically controls all facets of fund life, from the fund's incorporation through the selection of the initial board."). Importantly, advisers tend not to relinquish control given the financial stakes at issue. As John C. Bogle, founder of the Vanguard Group, explained:

> "[Mutual funds] are operated by external ... management companies which seek to earn high returns for fund investors, to be sure, but seek at the same time to earn the highest possible returns for themselves. Some of these companies are publicly held, in which case their shares are held by investors who own their shares for the same reason that investors own Microsoft or General Motors: To make money for themselves."

John C. Bogle, *Honing the Competitive Edge in Mutual Funds, Address Before the Smithsonian Forum*,

Washington, D.C. 5 (Mar. 23, 1999) (on file with authors); *see also* 1 Tamar Frankel & Ann Taylor Schwing, *The Regulation of Money Managers: Mutual Funds and Advisers* § 1.01[B][1][b] (2d ed. 2001) ("The practice of external management does not weaken the outside adviser's control over the management company. ... Besides, the company is dependent on the advisers' services."). Thus, advisers have every incentive to tightly control every aspect of their funds' operations. And this control tends not to be relinquished unless the adviser is bought by another external adviser, typically at a very nice profit.[8]

II. JCM WAS RESPONSIBLE FOR THE JANUS FUNDS' REGISTRATION STATEMENTS, AND THE INVESTING PUBLIC WOULD ATTRIBUTE THE REGISTRATION STATEMENTS TO JCM

Consistent with industry practice, the registration statements for the Janus Funds provide that JCM "is responsible for the day-to-day management of the ... business affairs of the Funds," including providing "administrative, compliance and accounting services ... [and] office space for the Funds." *E.g.*, J.A. 359a-60a; *see also* J.A. 250a-58a (indicating that all seventeen officers of the Janus Funds are also officers of JCM and that the Funds and JCM share the same general counsel). Indeed, the publicly filed Administrative Services Agreement for at least one of the Funds referenced in the Second Amended Complaint provides that JCM "shall perform or cause to be performed all ... *registration functions* of the Funds, including the preparation of reports and returns inci-

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[8] For a discussion on the extraordinary profitability of the fund management industry, see Freeman et al., *supra*, at 89-91.

dental thereto." *Janus Adviser Series, Administrative Services Agreement*, April 3, 2000, ¶ 1 (emphasis added).[9] At any rate, discovery in this case confirmed that JCM was specifically responsible for the registration statements at issue in this case. In particular, JCM admitted in its interrogatory responses that JCM's legal department drafted the registration statements and that JCM's General Counsel was one of the persons "ultimately responsible" for revisions and amendments to the registration statements. J.A. 507a-08a;[10] *see also In re Mutual Funds Inv. Litig.*, 590 F. Supp. 2d 741, 747 (D. Md. 2008) ("Janus defendants admit that 'it is undisputed that the Janus legal department drafted and edited certain prospectus language, which was then circulated among JCM and JCG employees for review.'"). These admissions are not surprising given the well-known captive nature of the typical adviser-fund relationship. *See supra* Part I.

The SEC has also determined that JCM, not the Janus Funds, was responsible for the registration statements at issue in this case. In a 2004 cease-and-desist order, the SEC found:

> JCM willfully violated Section 34(b) of the Investment Company Act in that *it* [i.e., not the Funds] made an untrue statement of material fact in a registration statement,

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[9] Available at http://www.sec.gov/Archives/edgar/data/1110822/0001110822-00-000003.txt. The Agreement is between Janus Adviser Series, which includes the Janus Adviser Worldwide Fund, and Janus Capital Corporation (JCC). JCM is the successor in interest to JCC. *See* Pet. App. 28a n.3.

[10] The cited material refers to the Janus Funds' prospectuses, which are part of the Funds' registration statements. *See supra* n.6.

> application, report, account, record, or other document filed or transmitted pursuant to the Investment Company Act .... For example, JCM [i.e., not the Funds] filed several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds.

In re Janus Capital Mgmt., LLC, Investment Advisers Act Release No. 2277, Investment Company Act Release No. 26532, 83 S.E.C. 1766, ¶ 26 (Aug. 18, 2004) (emphasis added), *reproduced at* J.A. 415a.

Given the well-known captive nature of the typical adviser-fund relationship, coupled with the public disclosures of JCM's responsibility for the day-to-day business affairs of the Janus Funds, including specifically responsibility for the registration statements at issue in this case (which the SEC has already found), there is no question the investing public would attribute the registration statements at issue to JCM. No inference is necessary.[11] Indeed, there is no one other than JCM to whom the investing public *could* attribute the registration statements. *See SEC Report* at 74 ("The fund remains, as it always was, without an identity and an organization separate from its adviser-underwriter.").

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[11] *Amici* herein agree with Respondent and the United States that attribution is not required in the context of this case. But at any rate, any attribution requirement would be met here.

III. AFFIRMING THE FOURTH CIRCUIT WOULD NOT EXPAND § 10(b) LIABILITY AND WOULD PROVIDE A NECESSARY REMEDY AGAINST INVESTMENT ADVISERS THAT DEFRAUD THEIR OWN SHAREHOLDERS

As explained above, JCM controlled the Janus Funds, in particular with respect to preparing the registration statements at issue in this case. Thus, Respondent's claim against JCM is a claim against a primary actor for making misleading statements that the investing public would attribute to it. Accordingly, affirming the Fourth Circuit does not require an exception to or expansion of § 10(b) liability as Petitioners repeatedly suggest. *See* Pet. Br. 8, 9, 14, 26-27. Moreover, contrary to Petitioners' assertion that recognizing liability in the context of this case is "entirely unnecessary to the effective operation of the securities laws," Pet. Br. 26, Respondent's claim represents a necessary and otherwise unavailable remedy against investment advisers who defraud their own shareholders by making misrepresentations in the registration statements for the funds they control. Indeed, immunizing advisers against such liability, as Petitioners would have this Court do, would encourage unscrupulous advisers to commit just this sort of fraud. And the incentive would be particularly strong given that the funds' registration statements are the very vehicle advisers use to market fund shares to prospective shareholders from whom the advisers hope to reap additional advisory fees, the profits from which attract investors in the advisers' stock. The Investment Company and Investment Advisers Acts of 1940 do not protect

against such fraud, and mutual fund directors are in no position to prevent it.

Petitioners argue that "[t]he 1940 Acts contain broad provisions ... prohibiting fraud and other misconduct by investment advisers." Pet. Br. 27. But the Acts are designed to protect investors in mutual funds, not investors in the mutual funds' advisers. *See Jones*, 130 S. Ct. at 1422 ("[The Investment Company] Act created protections for *mutual fund shareholders*.") (emphasis added). Moreover, while the Acts were adopted because of Congress's concern with the "potential for abuse" inherent in the adviser-fund relationship, which is "fraught with potential conflicts of interest," *Daily Income Fund*, 464 U.S. at 536 (internal quotations and citations omitted), the Acts do not eliminate the potential abuse or conflicts. *See* S. Rep. No. 91-184, at 5 (1969), *reprinted in* 1970 U.S.C.C.A.N. 4901 ("[A] mutual fund cannot, as a practical matter, sever its relationship with the adviser."). Nor do the 1940 Acts eliminate the possibility that advisers will exploit these conflicts to defraud their own shareholders through use of the registration statements for the funds the advisers control.

Petitioners also seem to imply that review and approval of registration statements by disinterested fund directors offers some level of protection. But such protection is inadequate to protect against the fraud at issue in this case. *Amici* herein, having served as disinterested directors to a mutual fund, know from personal experience that the directors, as a practical matter, do not have the resources or control to prevent such fraud. As the SEC has explained:

> The unaffiliated directors ... have no staff of officers and employees who work for and are

> compensated by the fund. ... Hence the unaffiliated directors necessarily obtain most of their information about fund operations from persons who also owe allegiance to, and obtain the preponderance of their compensation from, the adviser-underwriters .... Indeed, in some cases all of the fund's records are maintained by the fund's adviser. Although the unaffiliated directors under state law have an unqualified right of access to these records, the adviser, as a practical matter, is in a position to seriously hamper any employment of that right which might interfere with or threaten the adviser's operation of or control over the fund.

SEC Report at 130-31; *see also id.* at 12 ("[Unaffiliated directors] are seldom free as a practical matter to terminate a long established management relationship ...."); *A Study of Mutual Funds Prepared for the SEC by the Wharton School of Finance and Commerce*, H.R. Rep. No. 87-2274, at 34 (1962) ("[T]he independent director requirement may be of restricted value as an instrument for providing effective representation of mutual fund shareholders in dealings between the fund and its investment adviser."); Freeman & Brown, *supra*, at 617 ("In practice, while independent fund directors have the right ... to fire the fund's advisor or underwriter, those rights are virtually never exercised."). Influential industry observer Warren Buffet has been particularly critical of mutual fund directors:

> I think independent directors have been anything but independent. The Investment Company Act, in 1940, made these provisions for independent directors on the theory that

> they would be the watchdogs for all these people pooling their money. The behavior of independent directors in aggregate since 1940 has been to rubber stamp every deal that's come along from management—whether management was good, bad, or indifferent. Not negotiate for fee reductions and so on. A long time ago, an attorney said that in selecting directors, the management companies were looking for Cocker Spaniels and not Dobermans. I'd say they found a lot of Cocker Spaniels out there.

Strougo v. BEA Assoc., 188 F. Supp. 2d 373, 383 (S.D.N.Y. 2002) (quoting Haywood Kelly, *A Quick Q & A with Warren Buffett*, *Morningstar* (May 6, 1998)); *see also* Berkshire Hathaway, Inc., *2002 Annual Report* 17 (Warren Buffett stating that "a monkey will type out a Shakespeare play before an 'independent' mutual-fund director will suggest that his fund look at other managers, even if the incumbent manager has persistently delivered substandard performance").[12]

This case is on point. The directors of the Janus Funds were never made aware of Janus's market-timing arrangements despite widespread knowledge of them among Janus employees and executives. *See In re Lammert*, Release No. 348, Admin. Proc. File No. 3-12386, at 25 (SEC Apr. 28, 2008) ("The existence of approved market timing relationships was widely known no later than the completion of the Beery Report [in 2002], which was circulated to dozens of Janus employees and executives. This know-

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[12] Available at http://www.berkshirehathaway.com/2002ar/2002ar.pdf.

ledge was never shared with the Board.").[13] In fact, one long-term director did not learn of the market-timing arrangements until he read about them in the news. *See id.* at 12 ("Dennis Mullen (Mullen), a trustee since 1971, first learned about the allegations that Janus was allowing market timing in September 2003 from a news item he received via e-mail."). The idea that disinterested directors can police the kind of fraud at issue in this case is simply unrealistic. No one but the adviser is in a position to know whether the registration statements are fraudulent or not. Yet Petitioners disclaim responsibility for the registration statements and would have this Court immunize advisers from liability for fraudulent statements contained in registration statements. But no one else is behind the curtain.

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[13] Available at http://www.sec.gov/litigation/aljdec/2008/id348cff.pdf.

CONCLUSION

Because of the unique structure of the mutual fund industry, whereby investment advisers exert virtually complete control over their funds, including with respect to preparing registration statements for the funds, Respondent's claim represents a necessary and otherwise unavailable remedy against advisers who defraud their own shareholders by making misrepresentations in the registration statements. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 2, 2010

AMICUS CURIAE BRIEF

No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. and
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

—v.—

FIRST DERIVATIVE TRADERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NEW YORK STATE COMMON RETIREMENT FUND, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK FIRE DEPARTMENT PENSION FUND, NEW YORK CITY POLICE PENSION FUND, AND TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

This brief is filed on behalf of seven large public pension systems that serve as fiduciaries to millions of public employees who rely on them to prudently manage their retirement funds.[2] These public funds have a special responsibility to help ensure the accountability of participants in the securities markets, and therefore a strong interest in the integrity of, and eliminating fraud in, such markets.

The New York State Common Retirement Fund ("NYSCRF") holds and invests the assets of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. NYSCRF is one of the largest public pension funds in the United States and provides pension, disability and death benefits for New York state and local government employees and employees of certain other participating employers. As of March 31, 2010, NYSCRF had more than one million members, beneficiaries and retirees, and total net assets of approximately $132.6 billion. NYSCRF has served as lead plaintiff in numerous class actions resulting in some of the largest recoveries for shareholders in history.

Blanket consent to this filing was given by the parties.

[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of the brief.

[2] According to the US Census Bureau's 2010 Statistical Abstract, state and local retirement funds had $2.311 trillion in assets in 2008 ($1.238 trillion in corporate equities). U.S. Census Bureau, Assets of Private and Public Pension Funds (2009), available at http://www.census.gov/compendia/statab/2010/tables/10s1189.xls.

including *In re WorldCom, Inc. Sec. Litig.*, No. 02-cv-3288 (DLC) (S.D.N.Y.), with a settlement of more than $6 billion, *In re Cendant Corp. Sec. Litig.*, No. 98-cv-1664 (WHW) (D.N.J), with a settlement over $3.2 billion, and *In re McKesson Corp. HBOC, Inc., Sec. Litig.*, No. C-99-20743 RMW (N.D. Cal.), with a settlement over $1 billion.

The New York City Employees' Retirement System ("NYCERS"), in existence since 1920 and one of the largest public pension funds in the United States, has a rich history of shareholder activism and *amicus* involvement in corporate governance issues. *See, e.g., New York City Employees' Ret. Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995); *New York City Employees' Ret. Sys. v. Dole Food Co.*, 969 F.2d 1430 (2d Cir. 1992); *New York City Employees' Ret. Sys. v. Am. Brands, Inc.*, 634 F. Supp. 1382 (S.D.N.Y. 1986). NYCERS is a public employee retirement system established pursuant to Section 13-102 of the Administrative Code of the City of New York that provides retirement, disability and death benefits to certain New York City employees. NYCERS has over 300,000 active and retired participants and total plan assets of over $36.7 billion.

The Board of Education Retirement System of the City of New York ("BERS") provides pension benefits to approximately 32,000 active and 14,000 retired members, comprised mainly of non-pedagogical employees of the New York City Department of Education. Its plan assets exceed $2.5 billion.

The Teachers' Retirement System of the City of New York ("TRS") provides a retirement program

for some 180,000 active and retired participants who work, or have worked, for the New York City Department of Education, New York City Charter Schools or the City University of New York. TRS's basic qualified pension plan has some $36.8 billion in assets. In addition, the System administers a Section 403(b) tax-deferred annuity program, with more than $9 billion in assets.

The New York Fire Department Pension Fund ("FDPF") is a single-employer public employee retirement system serving full-time uniformed employees of the New York City Fire Department. FDPF has approximately 11,000 active members and 17,500 retired members, including widows and beneficiaries. Its assets are approximately $6.8 billion.

The New York City Police Pension Fund ("PPF"), in existence since 1857, was the first municipal retirement system established in the United States. It initially provided lump sum benefits for New York City police officers injured in the line of duty, and expanded some twenty years later to provide half pay retirement benefits to retired officers. PPF currently administers benefits for approximately 74,000 active and retired members; the plan assets, including variable supplements funds, are approximately $21 billion.

This case presents an issue of crucial importance to public pension funds such as the *amici*. The *amici* believe that Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), should be interpreted and applied in a manner that will help to promote Congress's intent to provide redress for misrepresentations and deceptive practices in the pur-

chases and sales of securities. The *amici's* overriding responsibility is to provide for the payment of benefits to their members and, in doing so, to invest for the long-term security of their millions of active and retired members. As major investors with long-term outlooks, the *amici* are vitally concerned with the proper and efficient functioning of U.S. capital markets and are concerned that investors not be harmed by fraudulent conduct.

Many state and local governments are constitutionally obligated to guarantee defined benefit retirement plans. Therefore, investment losses due to securities fraud fall directly on state and local governments, and ultimately, on taxpayers. If public pension funds are prevented from recovering money lost to securities fraud, the public will suffer.[3]

In recent years, public pension funds have become increasingly concerned about the integrity of U.S. securities markets. Scandals at Enron, WorldCom, Global Crossing, Tyco, Refco, Fannie Mae, Freddie Mac, Adelphia, Xerox, and numerous other public companies have caused hundreds of billions of dollars in losses to innocent investors. As investors who have been materially harmed by corporate fraud, the *amici* have an acute interest in ensuring that the law allows injured investors to recover from perpetrators of fraud.

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[3] From 2004 to 2007, investment earnings (as opposed to worker or government contributions) constituted between 74 and 82 percent of public pension funding. *See Notes* (Employee Benefit Research Institute) Vol. 30, No. 4, April, 2009, at 3, *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_04-Apr09.PblcPnsPlns1.pdf. With respect to NYSCRF and the New York City Funds, for each entity's respective FY10, this percentage exceeded 90%.

Investors' ability to redress corporate wrongdoing through private actions under the Exchange Act is absolutely essential to deter improper conduct and to recoup losses caused by fraud. If the courts further impair the ability of investors such as the public pension funds on whose behalf this brief is submitted to recover losses sustained due to fraud, the results for public employees—and for the taxpayers who would ultimately be required to make up any funding shortfalls—could be disastrous.

SUMMARY OF THE ARGUMENT

By this appeal, Petitioners ask this Court to engraft onto Section 10(b) a requirement that a person who drafts a false statement and provides it to another to release into the marketplace cannot be held liable under Section 10(b) if the person who published the statement did not publicly attribute the statement to the person who wrote it.

Petitioners thereby seek to exempt from liability under Section 10(b) a wide range of persons and entities responsible for the issuance of false and misleading statements to investors. If Petitioners are successful in obtaining such a judicially-created attribution rule, the ability of investors injured by securities fraud to recover will be severely impaired. The *amici*, public pension funds on which millions of retirees depend for their pension benefits, are major investors who rely on the integrity of the securities markets. Depriving the victims of fraud of the ability to recover from the persons responsible for the false

and misleading statements would have enormous adverse consequences for the *amici*, their beneficiaries, and the taxpayers who, in part, fund the systems.

The attribution rule proposed by Petitioners is not required by the plain language of Section 10(b) and Rule 10b-5 nor by prior decisions of this Court. To the contrary, the rule is inconsistent with this Court's precedents, such as *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.22 (1983). Approval of such an attribution rule cannot fairly be inferred from the fact that Congress chose not to impose liability for aiding and abetting when Congress passed the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) ("PSLRA"). In so doing, Congress ratified the existing private right of action under Section 10(b), and as of that time, no court of appeals had adopted an attribution rule and one Circuit had explicitly held that substantial participation in the preparation of false statements is sufficient for a claim under Section 10(b). *See In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994).

ARGUMENT

I. BECAUSE PRIVATE ENFORCEMENT OF THE FEDERAL SECURITIES LAWS IS ESSENTIAL FOR THE PROTECTION OF INVESTORS AND THE PROPER FUNCTIONING OF THE SECURITIES MARKETS, THE COURT SHOULD NOT WEAKEN SUCH ENFORCEMENT BY JUDICIAL CREATION OF BARRIERS THAT PREVENT INVESTORS FROM PURSUING VALID CLAIMS

Reversal of the decision below could deal a serious—if not fatal—blow to many meritorious securities fraud actions. At a minimum, reversal would make it far more difficult for the victims of securities fraud to recover from the perpetrators of fraud. Erecting barriers to private Rule 10b-5 cases would seriously undermine private enforcement of the federal securities law, to the detriment of investors and the proper functioning of the securities markets. And because taxpayers would ultimately bear the burden if public pension funds such as the *amici* submitting this brief cannot meet their obligations, weakened private securities enforcement could well have enormous consequences for the public.

Briefs submitted in support of Petitioners argue that weakening private securities enforcement would be a positive development for business and investors. *See, e.g.*, Brief of the Center for Audit Quality at 28-29 (suggesting it is bad for investors if auditors can be sued); Brief of the Chamber of Commerce at 2-3, 24 (suggesting securities litigation puts U.S. businesses at a competitive dis-

advantage). Both this Court and Congress, however, have recognized that just the opposite is true. Thus, as this Court stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006), "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." Preventing fraud in the purchase or sale of securities furthers the interests of both investors and honest businesses, because investor confidence in the integrity of the securities markets is crucial to helping businesses raise the capital that they require. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 235 n.12 (1988); *see also SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quoting *United States v. O'Hagan*, 521 U.S. 642, 658 (1997)) (Congress enacted the Securities Exchange Act to "'insure honest securities markets and thereby promote investor confidence' after the market crash of 1929"). Similarly, Congress also has rejected the notion that securities litigation is injurious to America's position in the global economy. *See* H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) ("private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs").

Briefs urging reversal also argue that weakening the ability of investors to sue the wrongdoers is tolerable because government enforcement by the Securities and Exchange Commission is sufficient to deter wrongdoing. *See, e.g.*, Brief of Securities Industry and Financial Markets Association at 17-21. While the SEC obviously plays an

important role in securities enforcement, this Court has "repeatedly . . . emphasized that implied private actions are . . . 'a necessary supplement to Commission action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)). SEC enforcement is not sufficient to deter wrongdoers and to compensate investors, because the SEC simply does not possess the resources to prosecute most instances of securities fraud. "Unless there is a vastly enlarged SEC, private actions inevitably must serve as an enforcement substitute for deterrence purposes, as well as their more traditional role as an avenue for appropriate compensation of victims."[4] Former SEC commissioners have noted that "[p]rivate actions are an especially important supplement to the Commission's enforcement program today because of the phenomenal growth of the securities industry during a time when the Commission's staff and budget levels have remained relatively constant."[5] As this Court has

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[4] Donald C. Langevoort, *Managing the "Expectations Gap" in Investor Protection: The SEC and the Post-Enron Reform Agenda*, 48 VILL. L. REV. 1139, 1161 (2003).

[5] Arthur Levitt, SEC Chairman, & Isaac C. Hunt, SEC Commissioner, *The Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260*, Testimony Before Senate Banking Subcommittee on Securities (Oct. 29, 1997); *see also* Eliezer M. Fich & Anil Shivdasani, *Financial Fraud, Director Reputation, And Shareholder Wealth*, 86 J. FIN. ECON. 306, 311 (2007) ("limited resources prevent the SEC from pursuing all cases"). As former SEC Chief Accountant Lynn Turner has observed, "[t]he SEC is in worse shape today than the French army was after its defeat at Waterloo." Jesse Westbrook, *Cox Quits at SEC, Leaves Schapiro to Restore Clout*, Bloomberg (Jan. 21, 2009).

recognized, private securities litigation is a valuable part of the overall enforcement regime that compensates defrauded investors, deters fraud, promotes investor confidence and facilitates the fair and efficient functioning of our capital markets. "[P]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-21 n.4 (2007) (quoting *Dabit*, 547 U.S. at 81).

Lastly, briefs urging reversal argue that a bright-line attribution rule is needed to further the allegedly "crucial goals of certainty and predictability." Brief of Securities Industry and Financial Markets Association at 3; *see also* Brief of the Chamber of Commerce at 4. The only certainty that the attribution rule provides is that fraudsters can avoid liability if they can manage to remain anonymous. Moreover, as this Court stated in *Basic*, "ease of application alone is not an excuse for ignoring the purposes of the securities acts and Congress' policy decisions." 485 U.S. at 236. The fact is that claims under Section 10(b) involve numerous other elements, such as scienter and loss causation, that are not bright-line tests but rather require application of judgment and consideration of particular facts and circumstances. Taken to its extreme, elevating the allegedly "crucial goals of certainty and predictability" above all others would militate for abolition of the private right of action under Section 10(b). But that is a decision for Congress, and Congress has "ratified the implied right of action." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

Reversal of the decision below would seriously impair the ability of investors to recover for fraud. Such a result would be terribly detrimental not only to public pension funds and other investors but also to legitimate businesses that participate in the capital markets.

II. CLICHÉD ASSERTIONS BY *AMICI* SUPPORTING PETITIONERS THAT PRIVATE SECURITIES LITIGATION IS ABUSIVE SHOULD NOT INFLUENCE THIS COURT'S DECISION

Briefs submitted by *amici* in support of reversal argue a need to curb private Rule 10b-5 cases because such cases are allegedly "vexatious"[6] and the "threat of abusive private securities litigation is substantial."[7] These anachronistic clichés should not prejudice this Court's decision on this appeal.

First, the rule advocated by Petitioners would not only impact securities class actions, it would also apply to non-class cases that institutional investors such as the *amici* can and do bring. Congress has recognized the constructive role that institutional investors play in securities litigation; indeed, far from criticizing them, through the PSLRA Congress sought "to increase the likelihood that institutional investors will serve as lead plaintiffs" in class cases. H.R. Rep. No. 104-369, at

[6] Brief for Attorneys' Liability Assurance Society, Inc. at 16.

[7] Brief of Securities Industry and Financial Markets Association at 18.

34. But the attribution rule would undermine both class actions and individual actions alike.

Second, there is no need for the Court to strain to excuse from liability persons engaged in fraudulent conduct out of any concern over excessive securities litigation. The facts indicate that the PSLRA has already achieved Congress's intent to remedy perceived abuses in private securities litigation. Since 1995, the dynamics of private securities litigation, especially cases involving large investor losses, have changed radically. Institutional investors, such as the *amici* submitting this brief, have come to the fore in most such cases, seeking appointment as lead plaintiffs and negotiating lower attorneys' fees, as a percentage of recoveries, than was typical before the PSLRA. Potentially frivolous cases no longer pose the problems that previously worried courts, while meritorious cases have gained prominence in response to recent outbreaks of corporate wrongdoing. Institutional investor participation has increased recoveries substantially, the number of lawsuits filed has declined, and the dismissal rate has jumped.[8] Whatever concerns courts might once have had about abusive securities litigation, "under the PSLRA this problem may have sub-

[8] Todd Foster, *et al.*, *Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar*, at 2 (Jan. 2007), NERA Economic Consulting, *available at* http://www.nera.com/image/BRO_Recent_Trends_SEC1288_FINAL_0307.pdf; *see also* Cornerstone Research, *Securities Class Action Case Filings: 2009: A Year in Review* (2010) *available at* http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_Research_Filings_2009_YIR.pdf (securities class action filings decreased 24 percent in 2009 from filings in 2008).

sided." John C. Coffee, Jr., *Future of Class Actions Depends on Pending Cases*, N.Y. LAW JOURNAL, Mar. 27, 2007, at 5. Indeed, as Professor Coffee has noted, "[t]he true 'strike suit' nuisance [securities] action, filed only because it was too expensive to defend, is, in this author's judgment, a beast like the unicorn, more discussed than directly observed." John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1536 n.5 (2006).

With each day bringing new revelations as to egregious acts of securities fraud across the country, it is difficult to look at the landscape today and argue that the greatest threat to America's securities markets is abusive litigation.

III. THE DECISION BELOW SHOULD BE AFFIRMED

A. The Plain Language of Section 10(b) and Rule 10b-5 Does Not Require Attribution

The starting point in interpreting the meaning of words used in a statute or rule must be "the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Section 10(b) makes it unlawful "for any person, directly or indirectly, . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." Rule 10b-5(b) makes it unlawful "[t]o ***make*** any untrue statement of a material fact . . ." (emphasis added).

There is nothing in these phrases that requires or even implies that liability depends on whether the recipient of an untrue or deceptive statement knows the identity of the person responsible for the statement. Neither the statute nor the Rule uses words such as "attribute" or "attribution."

The verb "make" means "[t]o cause to exist or happen; bring about; create." AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) at 835.[9] "Make" is thus a causation concept. Under the plain meaning of the Rule, a person who creates a statement or causes a statement to exist, by, for example, dictating its language, "make[s]" a statement.[10]

This interpretation is further supported by the fact that both § 10(b) and Rule 10b-5 forbid engaging "directly or ***indirectly***" in the prohibited conduct (emphasis added). "There is no requirement that the alleged violator ***directly*** communicate

[9] This Court often has looked to dictionary definitions in interpreting the securities laws. *See, e.g., Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 n.5 (1985); *Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980); *Hochfelder*, 425 U.S. at 199 n.20.

[10] Petitioners argue that a speechwriter does not "make" the words in a speech (Brief for Petitioners at 41), but in fact, speechwriters are commonly credited with the words they draft. *See The Axes of Bush*, THE ECONOMIST (Mar. 2, 2002) (describing speechwriter David Frum as the "author of the phrase 'axis of evil'" in President George W. Bush's state of the union address); John W. Mashek, *Bush is challenged by one of his own*, BOSTON GLOBE, at 11 (Mar. 6, 1991) (describing Peggy Noonan as "the speech writer who coined the 'read-my-lips: no new-taxes' phrase" for President George H.W. Bush). Similarly, ghostwriters are understood to have written books — and thus made statements — even though the books may be released under another's name.

misrepresentations to [investors] for primary liability to attach." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998) (emphasis added) (citation omitted). A defendant who creates a false statement but provides it to another to release into the marketplace falls squarely within § 10(b) and Rule 10b-5's prohibition against violating those provisions "indirectly."

B. An Attribution Rule Is Not Required by But Rather Is Inconsistent With Prior Rulings by This Court

In *Herman & MacLean v. Huddleston*, 459 U.S. 375, this Court recognized that those who draft false portions of a registration statement can be held liable in private Rule 10b-5 actions. At issue in *Huddleston* was whether Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, provides the exclusive remedy for false statements contained in registration statements, or whether persons relying on false registration statements could also assert claims under Section 10(b). The Court reasoned that Section 10(b) liability was necessary notwithstanding the availability of Section 11 remedies because:

> [C]ertain individuals who play a part in preparing the registration statement generally cannot be reached by a Section 11 action. These include corporate officers other than those specified in 15 U.S.C. § 77k(a), lawyers not acting as "experts," and accountants with respect to parts of a registration statement which they are not named as having prepared or certified. If . . . purchasers in registered offerings

> were required to rely solely on Section 11, they would have no recourse against such individuals even if the excluded parties engaged in fraudulent conduct while participating in the registration statement. The exempted individuals would be immune from federal liability for fraudulent conduct even though Section 10(b) extends to '***any person***' who engages in fraud in connection with a purchase or sale of securities.

Id. at 387 n.22 (emphasis added).[11]

Petitioners' assertion that an attribution rule is required by prior decisions of this Court[12] is incorrect. None of those decisions held that attribution is necessary for the plaintiff to satisfy the element of reliance. To the contrary, *Stoneridge* held that reliance may be satisfied where the defendant's "deceptive acts" were "disclosed to the investing public," or where the defendant's conduct made the issuance of false statements "necessary or inevitable." 552 U.S. at 769-70. Neither of these requirements suggests that the defendant's ***identity*** must be publicly disclosed. Similarly, in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), the Court described the reliance element of a Rule 10b-5 claim as a showing that the "plaintiff relied upon that misrepresentation." *Id.* at 342.

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[11] *Huddleston* was decided before *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), but the Court recognized that the availability of aiding and abetting liability was an undecided question and therefore based its reasoning on primary liability. *See Huddleston*, 459 U.S. at 379 & n.5.

[12] Brief for Petitioners at 12.

Thus, to satisfy the element of reliance, it is only necessary to show that the allegedly false ***information*** was relied on by investors—not that it was attributed to any particular source. *See Basic Inc. v. Levinson*, 485 U.S. at 248-49; *see also In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008) ("the premise of *Basic* is that, in an efficient market, share prices reflect 'all publicly available information, and, hence, any material misrepresentations.' It thus does not matter, for purposes of establishing entitlement to the presumption [of reliance], whether the misinformation was transmitted by an issuer, an analyst, or anyone else."). Thus, this Court's prior decisions do not mandate that false statements be publicly attributed to a defendant in order for Section 10(b) liability to attach.

C. Congressional Approval of an Attribution Rule Cannot Be Inferred From Events Relating to the Passage of the PSLRA

Petitioners note that in *Stoneridge*, this Court stated that "[i]t is appropriate for us to assume that when" the PSLRA "was enacted, Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166.[13] Petitioners, however, then draw the wrong inference from such assumption. Congress did not reject liability for unattributed drafters when it declined to impose liability on aiders and abettors in the PSLRA. When the PSLRA was enacted in December 1995, no court had adopted an attribution rule. At that time, the

[13] *See* Brief for Petitioners at 15.

leading case in this Court on the subject, *Herman & MacLean v. Huddleston*, explicitly contemplated § 10(b) liability for unattributed drafters. *See* 459 U.S. at 387 n.22, quoted *supra*. Congress could hardly have anticipated that later courts would ignore *Huddleston* and misapply *Central Bank* so as to immunize wrongdoers simply because they act anonymously. If anything, Congress expected courts to employ the "substantial participation" test developed over a year earlier in *Software Toolworks*, 50 F.3d at 628 n.3, under which substantial participation in the preparation of fraudulent statements is grounds for primary liability.

D. Construing Section 10(b) to Require Explicit Attribution as a Prerequisite to Liability Leads to Undesirable Results That Congress Could Not Have Intended

Imposition of a strict attribution rule would provide a massive loophole through which false and misleading information can be disseminated to the investing public, as long as the person preparing the false information manages to remain anonymous. This is a bizarre and undesirable consequence that Congress could not have intended.

Congress enacted the Securities Exchange Act to "'insure honest securities markets and thereby promote investor confidence.'" *SEC v. Zandford*, 535 U.S. at 819 (quoting *United States v. O'Hagan*, 521 U.S. 642, 658 (1997)). The attribution rule frustrates this strong Congressional policy. Allowing a defendant to evade liability merely by avoiding having its name mentioned as the

source of a false statement "would allow those primarily responsible for making false statements to avoid liability by remaining anonymous, and thus would place a premium on concealment and subterfuge rather than on compliance with the federal securities laws." *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 333 (S.D.N.Y. 2004) (internal quotation marks omitted).

Under a strict attribution rule, one who drafts a false and misleading statement and hands it to another to release to the public cannot be held liable under Section 10(b), even if he or she acts with scienter, if the person who published the statement did not publicly identify the person who wrote it. At the same time, the person who published the statement, if that person did not have scienter, also escapes liability. In this scenario, no one could be held liable under Rule 10b-5(b) for the false and misleading statement.

For example, courts have held that subsidiaries can be held liable under Section 10(b) for creating false statements that were then published by their parent corporations. *See, e.g., In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333, 351-52 (S.D.N.Y. 2005). "To hold otherwise would enable parent companies to create subsidiaries under which all of its business would be conducted and then to shield the subsidiaries from section 10(b) liability by disseminating the subsidiary's false information." *Id.* at 352; *see also City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir. 2005) (Rule 10b-5 liability may be imposed on a corporation that communicates false information to a related entity, in the expectation that the latter entity will publicize that

information). If these holdings fail to survive adoption of a rule that statements must be publicly attributed to the defendant in order for liability under Section 10(b) to attach, a subsidiary "could freely disseminate false information to the market through its parent, but investors relying on that information to their detriment would be left with no remedy: an action could not be brought against the subsidiary, and the parent would escape liability because it lacked scienter. This 'would lead to a result "so bizarre" that Congress could not have intended it.'" *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 408 (S.D.N.Y. 1998) (quoting *Central Bank*, 511 U.S. at 188).

Another example involves companies that provide false information to security analysts, which is then presented to the investing public. There is a consensus that such companies can be held liable under Section 10(b) in these circumstances, even when that information is not publicly attributed to the company. *See Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000); *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 373 (5th Cir. 2004); *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1428 (3d Cir. 1997); *Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1997). If adoption of a strict attribution rule undermines these holdings, another huge loophole allowing false information to be disseminated to the investing public will have been created.

Lastly, there has previously been general agreement that if a corporate officer drafts a statement that is issued by the corporation, or supplies false information to be included in the corporation's published statements, that officer has made a statement within the meaning of Section 10(b) whether or not the information was specifically attributable to him or her. *See, e.g., Southland*, 365 F.3d at 365; *Schwartz v. Celestial Seasonings*, 124 F.3d 1246, 1254 (10th Cir. 1997). Indeed, the Second Circuit, which adopted an attribution rule in *PIMCO*, nevertheless has held that that a corporate officer can be held liable under Rule 10b-5 if the officer was "involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 75-76 (2d Cir. 2001). These holdings present considerations not involved in the case at bar and should not be affected by the Court's ruling in this case. To disturb this settled law would dramatically constrict Section 10(b) and allow dishonest corporate officials to escape responsibility for their conduct.

CONCLUSION

Enabling persons who create false and misleading statements to escape liability under the federal securities laws merely because their false statements are not publicly attributed to them is required neither by the words Congress used in Section 10(b) nor the Congressional intent reflected in that provision. To the contrary, adoption of an attribution requirement, with the result that a multitude of persons responsible for false and misleading statements can no longer be sued under Rule 10b-5, would run afoul of the policies that underlie Section 10(b) and would have disastrous consequences for public pension funds such as the *amici*. It is difficult enough in the current economic environment for public pension funds to generate the returns necessary to fulfill their obligations. A judicially-created barrier to recovery of losses due to fraud will only exacerbate the problem, to the detriment of the retirees who depend on pensions and the taxpayers would are ultimately obligated to finance public pension funds if there are shortfalls.

For the reasons stated herein and in the Respondent's Brief, the decision below should be affirmed.

Dated: November 2, 2010

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v.

FIRST DERIVATIVE TRADERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit www.sifma.org.

SIFMA has a particular interest in this litigation because of the potential adverse impact on the securities industry. Respondent seeks to obtain what Congress did not provide: a private civil remedy against secondary actors under § 10(b) of the Securities Exchange Act of 1934. As this Court has recognized twice in recent years, the judicial creation of such a remedy would impose tremendous costs and have significant "ripple effects" that are detrimental to issuers and investors alike. *Cent. Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 189 (1994); see also *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163–64 (2008) (explaining how the prospect of "extensive discovery"

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3, *amicus curiae* states that petitioners and respondent have consented to the filing of this brief; petitioners and respondent have separately filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs.

can enable "plaintiffs with weak claims to extort settlements from innocent companies"). For this reason, and as further explained below, SIFMA respectfully urges the Court to reverse.

SUMMARY OF ARGUMENT

This is the third time since 1994 that the Court has addressed the standards for imposing private civil liability under § 10(b) of the Securities Exchange Act of 1934 on a party who made no statement of its own to the public markets. It should be the last. As the Court has done before, it should reject the *ad hoc* approach taken by the court of appeals, which imposes primary liability on parties who did not make the statements at issue and were not publicly identified as the source of those statements. Instead, the Court should adopt the workable, bright-line rule that a number of circuits have developed through more than a decade of case law. Under this rule, known as the direct-attribution test, only those parties to whom a statement is publicly attributed at the time it is made may be civilly liable to purchasers or sellers on the public markets for its contents. The reasons are threefold.

First, the bright-line rule, unlike the Fourth Circuit's holding, is consistent with the language of § 10(b), which imposes liability only on those who actively "use or employ" a false statement "in connection with" a purchase or sale of securities, and with the language of Rule 10b-5(b), which holds liable only those who "make" a false or misleading statement. Both the statute and the rule are most naturally read to refer to the public act of issuing a statement under one's own name. By permitting liability for lending assistance, the Fourth Circuit's approach ignores the text of the statute and rule,

improperly expands the judicially implied private right of action, and collapses the distinction between primary and secondary liability, in conflict with this Court's precedents.

Second, a bright-line rule best satisfies the crucial goals of certainty and predictability in rules governing the securities markets and securities litigation. As this Court has repeatedly recognized, the securities laws best protect investors when judicially administrable rules provide clear guidance to issuers and the securities industry, thus lowering the costs of compliance that ultimately would otherwise be passed on to investors. The Fourth Circuit's approach, which is based on novel, case-specific presumptions and inferences that can evolve over time, would create massive uncertainty as to when secondary actors may be held primarily liable for statements they did not themselves make—uncertainty that private plaintiffs would undoubtedly exploit by bringing strike suits bearing substantial nuisance value but lacking legal merit. That approach is directly at odds with the approach Congress has taken to limit abusive securities litigation in light of the substantial costs it imposes on both companies and investors.

Third, a more expansive interpretation of § 10(b) is not necessary because Congress has provided adequate, carefully circumscribed means to hold secondary actors liable for causing, controlling, or assisting the making of false or misleading statements in public statements to the market. In so doing, Congress has often limited the parties who can sue, or permitted only the government to enforce particular provisions. Indeed, Congress has returned to this area frequently, most recently passing comprehensive legislation in 2010 that expanded the

SEC's ability to pursue secondary actors in the mutual fund industry. Expanding the § 10(b) cause of action to reach the conduct alleged here would nullify the express limitations Congress has imposed.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE TEXT OF § 10(b) AND RULE 10b-5 AND THIS COURT'S PRECEDENTS.

Two cardinal principles have defined this Court's jurisprudence under § 10(b). *First,* the Court has repeatedly held that in determining "the scope of conduct prohibited by § 10(b), the text of the statute controls." *Cent. Bank*, 511 U.S. at 173; see also *id.* at 177 ("It is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text."). *Second,* the Court has instructed that Congress, not the courts, must take the lead if the implied private right of action under § 10(b) is to be extended beyond its present boundaries. See *Stoneridge*, 552 U.S. at 165 ("The decision to extend the cause of action is for Congress, not for us."). The decision below violates both of these guiding principles.

1. Whether viewed as a gloss on the misrepresentation requirement or (as the lower court considered it) the reliance requirement, the Fourth Circuit's theory of liability cannot be squared with the text of § 10(b) and Rule 10b-5. Section 10(b) makes it unlawful "*[t]o use or employ*" a "manipulative or deceptive device or contrivance" in violation of SEC rules. 15 U.S.C. § 78j(b) (emphasis added). And the section of Rule 10b-5 under which respondent proceeds renders it unlawful "[t]o *make* any untrue statement of material fact" in connection

with the purchase or sale of a security. 17 C.F.R. § 240.10b-5(b) (emphasis added).

As petitioners have shown, the plain language of these provisions requires active misconduct. The defendant must "use or employ" a deceptive device and "make" a false or misleading statement. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 200–01, 212–13 (1976) (emphasizing that the statute's language "clearly connotes intentional misconduct"). Merely playing a supporting role does not give rise to liability.[2]

The only Janus entity that actually "made" the statements in each prospectus was the mutual fund itself, whose duty it was to file a registration statement containing the prospectus. One who merely assists with or participates in the drafting of a document issued by another does not "make [a] . . . statement" within the ordinary meaning of that phrase. Just as secretaries who draft letters for their bosses and law clerks who draft opinions for their judges do not "make" any statements of their own, an investment advisor who helps draft a prospectus for review and approval by a mutual fund does not "make" the statements contained in the prospectus.

Nor does helping disseminate a statement made by another qualify as "making" a statement. A courier, for example, does not "make" the statements in the documents he delivers. And there is no sense in which merely having a document available for

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[2] The statute does not impose any affirmative duties to act; a failure to speak may be grounds for liability only if the defendant is under a preexisting duty of disclosure that "arises from [a] specific relationship between two parties." *Cent. Bank*, 511 U.S. at 180 (citing *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980)).

download on one's website constitutes "making" the statements contained in the document. Indeed, every prospectus and registration statement is posted on the SEC's website, yet it would be absurd to speak of the SEC as "making" the statements contained therein. Similarly, diversified financial services companies often host the documents of their various subsidiaries and affiliates on one website for ease of investor access, but no court has ever suggested that this practice makes the parent the guarantor of all of those statements.

2. Moreover, under § 10(b) and Rule 10b-5, the alleged misconduct must occur "in connection with the purchase or sale of any security." With this language, Congress required a nexus between the deception and the purchase or sale. "Not deception alone, but deception with respect to certain purchases or sales is necessary for a violation of statute." *Morrison* v. *Nat'l Austl. Bank*, 130 S. Ct. 2869, 2887 (2010). "Those purchase-and-sale transactions are the objects of the statute's solicitude." *Id.* at 2884.

The decision below ignores this requirement and allows suits to be brought on the basis of statements having only the most attenuated relationship with the plaintiffs' purchase or sale of securities. The foreseeable and intended recipients of the mutual fund prospectuses were fund shareholders. It is for their information that the prospectuses were prepared, and they were the ones who were legally required to receive copies of them pursuant to the provisions of the Securities Act of 1933 and the Investment Company Act of 1940.

But respondent is not an investor in the funds. It is an investor in JCG, whose securities were not described in the fund prospectuses. Respondent does not allege that it or any other member of the putative

class even received, let alone read, a copy of the prospectuses at issue. It stretches the statutory language beyond the breaking point to extend § 10(b) to someone who did not even receive the document at issue or buy the securities to which it pertains.

3. In addition to ignoring the plain language of the statute and rule, the decision below expands the private right of action beyond its present boundaries in violation of this Court's express instruction in *Stoneridge*. It does so in two ways.

First, in *Central Bank*, this Court held that "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)." 511 U.S. at 191. Although Congress has since amended the statute to allow the *SEC* to pursue aiders and abettors, it has rejected invitations to create a private right of action for aiding and abetting. See, *e.g.*, *Stoneridge*, 552 U.S. at 158.

The decision below eviscerates this distinction and vastly expands the § 10(b) private right of action by imposing primary liability for conduct that constitutes, at most, mere aiding and abetting. Allegations of "participating," "helping," or "assisting" are simply ways of saying "aiding and abetting," "scheming," or "conspiring" without using those words. See *Cent. Bank*, 511 U.S. at 181, 184 ("substantial assistance" or "knowing participation"); *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) ("Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms . . . all fall within the prohibitive bar of *Central Bank*.").

This Court recently rejected a similar theory in *Stoneridge*, holding that imposing primary liability on a party who "schemed" behind the scenes to cause the falsification of financial statements "would revive

in substance the implied cause of action against all aiders and abettors except those who committed no deceptive act in the process of facilitating the fraud." 552 U.S. at 162–63. Indeed, *Stoneridge* specifically rejected the notion that a secondary actor can be held liable for "providing assistance" to a company that makes a false or misleading statement. *Id.* The Court should do the same here, lest it "undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants." *Id.*

Second, the Fourth Circuit improperly extended the presumption of reliance to investors who did not receive the prospectus or buy the securities to which it pertains. Worse, the court did so not based on any empirical study of the markets—as in *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988)—but on unprovable guesswork about what investors would assume. As this Court has recognized, a plaintiff may not "base its action on Rule 10b-5 . . . without having either bought or sold the securities described in the allegedly misleading prospectus." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 84 (2006) ("[T]his Court in *Blue Chip Stamps* relied chiefly, and candidly, on 'policy considerations' in adopting that limitation.") (quoting *Blue Chip Stamps*, 421 U.S. at 737). The judicially implied presumption of reliance predates the Private Securities Litigation Reform Act of 1995 (PSLRA), see *Basic*, 485 U.S. at 241–49, and should not be further expanded without congressional action.

II. THE FOURTH CIRCUIT'S THEORY OF LIABILITY WOULD CREATE CRIPPLING UNCERTAINTY IN THE SECURITIES MARKETS.

1. This Court's strict adherence to the text of the statute and rule has long been informed by "[t]he practical consequences" of interpreting the statute expansively. *Stoneridge*, 552 U.S. at 157–64. Because the securities markets are "'an area that demands certainty and predictability,'" *Cent. Bank*, 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)), the Court has rejected tests that are "complex in formulation and unpredictable in application," *Morrison*, 130 S. Ct. at 2878. As the Court noted in *Central Bank*, the lack of clear and predictable liability rules "leads to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." 511 U.S. at 188. "'[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Id.*

Accordingly, this Court has repeatedly stressed the need for unambiguous, readily administrable rules to govern and constrain private securities-fraud litigation. Without such rules, the Court has admonished, private lawsuits can be employed "abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). "[P]laintiffs with weak claims [can] extort settlements from" companies that are innocent, but that nevertheless fear "extensive discovery and the potential for uncertainty and disruption in a

lawsuit." *Stoneridge*, 552 U.S. at 163–64; see also *Merrill Lynch*, 547 U.S. at 80–81.

The risk that such suits will force settlements is anything but fanciful. In 2008 alone, almost 100 private securities suits settled for a total value of $3.6 billion. See PriceWaterhouseCoopers, *2008 Securities Litigation Study* 18 (Grace Lamont ed. Apr. 2009). That these cases sometimes settle for substantial amounts does not mean that the lawsuits are meritorious. To the contrary, and as this Court has acknowledged, the staggering cost and disruption of the discovery process places immense pressure on companies to settle—regardless of the merits—once their motion to dismiss the suit on the pleadings has been denied. See *Blue Chip Stamps*, 421 U.S. at 741; see also *Cent. Bank*, 511 U.S. at 189 ("uncertainty [in] the governing rules" could prompt companies, "as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial").

2. The Fourth Circuit's novel approach invites such uncertainty and staggering costs. Unlike the well-tested direct-attribution rule, which offers a "bright line" developed in the case law for more than a decade, the lower court's decision provides no useful guidance. Instead, it offers a "case-by-case" analysis, which examines the "essence" of the complaint and asks whether, "'as a practical matter,'" unidentified "interested investors" would "infer" that the defendant "played a substantial role" in preparing or approving the content of the disclosure. Pet. App. 17a–24a.

None of these terms is defined, and none has an established meaning in § 10(b) jurisprudence.[3] But all of them would undoubtedly provide ample grist for plaintiffs' lawyers, who would vigorously test their limits in protracted and burdensome litigation. On a "case-by-case" basis, defendants would be required to fend off novel claims, reviewed under an evolving and cryptic standard, which, as this case shows, offers a wide path to discovery and few guideposts along the way. The Fourth Circuit's amorphous standard would virtually ensure that meritless complaints would survive motions to dismiss, opening the door to costly discovery and the attendant pressure to settle.

If Congress chose to impose this unworkable regime, that would be its prerogative. But Congress has taken the opposite path, seeking "to protect investors and maintain confidence in the securities markets" in response to "significant evidence" of abusive litigation practices. H.R. Rep. No. 104-369, at

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[3] The "substantial participation" standard referenced in two Ninth Circuit cases, *see Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628-29 & n.3 (9th Cir. 1994), offers no more precise guidance. The defendant-auditor in *Software Toolworks* was sued over letters to the SEC that identified it as a source "and actually referred the SEC to two [audit] partners for further information," 50 F.3d at 628 n.3, and the court in *Howard* declined to apply the rule on the grounds that the statement at issue was publicly attributed to a corporate officer, *see* 228 F.3d at 1062-62. Thus, nothing in the case law distinguishes "substantial participation" from liability for aiding and abetting, which "has been interpreted to include 'participation in the editing' of information for the purpose of marketing securities." *SEC* v. *Fehn*, 97 F.3d 1276, 1293 (9th Cir. 1996). Even the SEC has recognized that the test is susceptible to "misinterpretation" because it could reach beyond primary conduct. *See* Brief for SEC as *Amicus Curiae* at 18-19, *Klein* v. *Boyd*, Nos. 97-1143, 97-1261 (3d Cir. filed Apr. 1998).

31 (1995) (Conf. Rep.). This has been a wise course. As the Court has recognized, "the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors." *Cent. Bank*, 511 U.S. at 189. As a result, extending the scope of the implied private cause of action under § 10(b) may well harm the very investors that the statute was designed to protect. Further, the increased risk of liability would drive business decisions that could likewise injure investors. See, *e.g.*, *id.* ("[N]ewer and smaller companies may find it difficult to obtain advice from professionals"). Now is not the time to change direction and, through judicial fiat, create innovative avenues for securities litigation.

III. CONGRESS HAS PROVIDED ADEQUATE EXPRESS REMEDIES FOR THE CONDUCT ALLEGED.

A clear and predictable application of § 10(b) and Rule 10b-5 does not leave private plaintiffs, or the government, without remedies. To the contrary, Congress has provided numerous remedies for the conduct alleged here—and placed limits upon those remedies for a reason. The decision below nullifies these limits and overhauls the comprehensive and reticulated scheme that Congress has enacted and repeatedly refined.

This Court's approach is "to construe statutes, not isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995). The Court has thus cabined the implied § 10(b) cause of action so that it does not render superfluous the restrictions in other provisions of the 1933 and 1934 Acts. See, *e.g.*, *Cent. Bank*, 511 U.S. at 178–79 ("[W]e use the express causes of action in the securities Acts as the primary

model for the § 10(b) action."); *id.* at 182–83; *Ernst*, 425 U.S. at 206–10; *Blue Chip Stamps*, 421 U.S. at 736. The Court has also refused to "expand the defendant class for 10b-5 actions beyond the bounds delineated for comparable express causes of action." *Cent. Bank*, 511 U.S. at 180; see also *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1104 (1991).

Examination of the provisions of the 1933 and 1934 Acts shows that § 10(b) should not be extended to create private civil claims against parties who have no public role in a statement to the markets. Such a result would improperly override the limits on the express civil claims created by Congress, and undo Congress's decision that only the SEC and the Justice Department may sue such defendants. "The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Cent. Bank*, 511 U.S. at 184. The Fourth Circuit's decision violates this principle.

Privately Enforceable Provisions

1. Section 20(a) of the 1934 Act and § 15 of the 1933 Act. In many cases, the argument for extending liability beyond the parties named in a public statement is to provide a claim against unaffiliated secondary actors such as accountants, attorneys, and investment banks. Here, the underlying thrust of respondent's claims is the notion that JCM, while a separate corporation from the Janus funds, somehow influenced them. Pet. App. 27a–31a. But Congress has provided explicit remedies for this situation under both the Securities Exchange Act of 1934 and the Securities Act of 1933. See 15 U.S.C. §§ 77o & 78t(a) (providing that "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation

thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action"). These provisions, "in marked contrast to the implied § 10 remedy . . . impose derivative liability." *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 296 (1993).

These provisions, however, do not apply in this case. Plaintiffs have not alleged that JCM "controls" the funds, which are governed by independent trustees. See 15 U.S.C. §§ 80a-15(a)-(c), 80a-24(a); see also *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422–23 (2010); *Laperriere* v. *Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008) (per curiam) ("The legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws."). There is no need to distort § 10(b)'s terms to duplicate the provisions of the control-person statutes, and there is certainly no basis to stretch the bounds of § 10(b) to cover terrain onto which Congress did not venture.

2. Sections 11 and 12 of the 1933 Act. Section 11 of the 1933 Act creates a claim only against enumerated defendants for misrepresentations or omissions in a registration statement for an offering of new securities. See 15 U.S.C. § 77k(a). This list includes directors of the issuer, underwriters, and those who sign or consent to be named in a registration statement. *Id.*; see also *Cent. Bank*, 511 U.S. at 179. But it does not encompass investment

advisers to a mutual fund, which are governed by the Investment Company Act of 1940 and the Investment Advisers Act of 1940. See, *e.g.*, 15 U.S.C. § 80b-6 (prohibiting fraud and other misconduct); see generally *Jones*, 130 S. Ct. 1418.

Section 12(a)(1) and (a)(2) claims are directed against anyone who "[o]ffers or sells a security . . . by means of a prospectus or oral communication" that is false or misleading, or in violation of registration requirements, and may be brought only by "the person purchasing such security from him." 15 U.S.C. § 77*l*(a)(1)–(2). The class of defendants is limited to those in privity with the plaintiff or who directly solicit the plaintiff's purchase at least in part for their own financial gain. This Court rejected extending § 12 liability to someone "'whose participation in the buy-sell [securities] transaction is a substantial factor in causing the transaction to take place.'" *Pinter* v. *Dahl*, 486 U.S. 622, 649 (1988); see *Cent. Bank*, 511 U.S. at 179. The Fourth Circuit offered no basis to ignore Congress's express limits here.

3. Section 18(a) of the 1934 Act. In § 18(a) of the 1934 Act, Congress addressed when a silent defendant should face private civil liability based on another defendant's misstatement or omission. Section 18(a) imposes liability on a defendant who "shall make *or cause to be made*" a statement that is "false or misleading with respect to any material fact" in "any application, report or document filed" pursuant to the 1934 Act. 15 U.S.C. § 78r(a). In § 10(b), by contrast Congress did not prohibit "causing" a deceptive device, but instead stopped at the defendant who actually "use[s] or employ[s]" the deceptive device in connection with a purchase or sale of securities.

Section 18(a) thus reaches a broader class of defendants than § 10(b). But it also includes a critical limitation. To preclude open-ended damages awards to the market as a whole, Congress required that the plaintiff show he actually read and relied upon the misstatement: Section 18(a) limits potential plaintiffs to "any person (not knowing that such statement was false or misleading) who, *in reliance upon such statement*, shall have purchased or sold a security at a price which was affected by such statement, for damages *caused by such reliance*." 15 U.S.C. § 78r(a) (emphases added). Because the statute expressly refers to the plaintiff's reliance on the specific statement—in addition to the requirement of an effect on the market price—it can be satisfied only by proof of individual reliance, rather than by the fraud-on-the-market presumption available under § 10(b). See, *e.g.*, *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 283–84 (3d Cir. 2006); *Heit* v. *Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

The Fourth Circuit's decision would gut § 18(a). No private plaintiff would sue a secondary actor under § 18(a), which requires actual reliance, if he could sue the same defendant *without* proving actual reliance. Obviously, only Congress, not the lower courts, is allowed to abrogate statutory provisions.

4. Section 9(f) of the 1934 Act. Like § 18(a), § 9(f) of the 1934 Act reaches beyond defendants who use or employ the specified unlawful devices.[4] Sections 9(a)–(c) prohibit certain enumerated forms

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[4] Section 9(f) was formerly § 9(e) until it was renumbered under the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. IX, sec. 929X(b), § 9, 124 Stat. 1376, 1870 (2010) (codified at 15 U.S.C. § 78i).

of market manipulation, and § 9(a)(4) prohibits false or misleading statements by a dealer, broker, "or the person selling or offering [a security] for sale" made "for the purpose of inducing the purchase or sale" of that security. 15 U.S.C. § 78i(a)–(c). Unlike § 10(b), § 9(f) creates additional express private civil liability for "[a]ny person who *willfully participates in* any act or transaction" prohibited by §§ 9(a)–(d). *Id.* § 78i(f) (emphasis added). As this Court has held, § 9(f) shows that "Congress knew of the collateral participation concept," and thus that the concept should not be implied into other civil-liability provisions. *Pinter*, 486 U.S. at 650 n.26. Nonetheless, even the class of defendants under § 9(f) does not include "one who aids or abets a violation." See *Cent. Bank*, 511 U.S. at 179.

The Fourth Circuit's approach would render important restrictions on the express § 9(f) action meaningless. For example, § 9 is limited to specified manipulative practices and a narrow class of false or misleading statements made directly between buyers and sellers of securities, see, *e.g.*, *Robbins* v. *Banner Indus.*, 285 F. Supp. 758, 761 (S.D.N.Y. 1966), for the specific "purpose of inducing the purchase or sale" of the specific security purchased or sold by the defendant, 15 U.S.C. § 78i(a)(4). Thus, unlike under § 10(b), a purchaser in the secondary market could not sue an issuer (let alone an adviser to the issuer) under § 9 over its periodic financial reports. See *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783, 788 (2d Cir. 1951) (§ 9(a)(4) "impose[s] restrictions somewhat like those imposed on a suit under Sec. 11 of the 1933 Act"). These limitations should not be ignored.

Government Enforced Provisions

Other provisions of the 1933 and 1934 Acts allow *only* the SEC and the Justice Department to sue for

the kind of conduct alleged here. These provisions reflect Congress's considered judgment to limit abusive securities-fraud litigation by private plaintiffs. The detrimental effect of such litigation on the competitiveness of American business was a driving concern of Congress in enacting the PSLRA and the Securities Litigation Uniform Standards Act of 1998. See H.R. Rep. No. 104-50, pt. 1, at 20 (1995) ("Fear of litigation keeps companies out of the capital markets."); 143 Cong. Rec. S10475, S10477 (daily ed. Oct. 7, 1997) ("[I]f our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong, we must create uniformity and certainty.").

The threat of abusive private securities litigation is substantial. In the decade following the PSLRA, 2,465 issuers were named as defendants in securities-fraud class actions out of approximately 6,000 companies listed on the major U.S. exchanges. See Comm'n on the Regulation of U.S. Capital Mkts. in the 21st Century, *Report and Recommendations* 30 (Mar. 2007). It is for precisely these reasons that Congress has repeatedly provided broader remedies to the government than to private plaintiffs. Respondent's argument would nullify these policy choices made by Congress.

1. Section 17(a) of the 1933 Act. When Congress wanted to create broad liability for employing fraudulent "schemes" and "practices" it did so expressly. Section 17(a) of the 1933 Act, for example, makes it unlawful "to employ any device, *scheme*, or artifice to defraud, *or* . . . to *engage in* any transaction, practice, or *course of business* which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(1), (3) (emphasis added). Section 17(a) reaches any sale in the primary and secondary markets, including sales of open-ended

mutual funds. See *Gustafson*, 513 U.S. at 577–78; *United States* v. *Naftalin*, 441 U.S. 768, 777–78 (1979). The SEC has regularly used § 17(a) against secondary actors, see, *e.g.*, *Weiss* v. *SEC*, 468 F.3d 849, 855–56 (D.C. Cir. 2006), and against an array of fraudulent schemes, see, *e.g.*, *Brian A. Schmidt*, Rel. No. 33-8061, 2002 WL 89028, at *7–8 (Jan. 4, 2002).

But § 17(a) does *not* create a private right of action. See, *e.g.*, *Finkel* v. *Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992) (citing cases). Instead, § 17(a)'s sweeping prohibitions are bounded by the SEC's and the Justice Department's prosecutorial discretion, which ensures a focus on serious wrongdoing and the public interest. This is in marked contrast to the pursuit of private remedies, where the private plaintiffs' bar has a powerful economic incentive to sue and to extract nuisance settlements.

2. Other Provisions in the 1933 and 1934 Acts. Like § 17(a), other provisions of the 1933 and 1934 Acts expressly authorize the government, but not private civil plaintiffs, to pursue a variety of secondary actors. The 1934 Act grants the SEC express statutory authority to pursue registered broker-dealers and their "associated" persons who "willfully aided, abetted, counseled, commanded, induced, or procured" violations of the securities laws. 15 U.S.C. §§ 78o(b)(4)(E), 78u-2(a)(2); see also *Cent. Bank*, 511 U.S. at 183. The SEC can also sue ongoing and future violators of the securities laws "and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation." 15 U.S.C. § 78u-3(a). Similarly, the federal government can pursue those who "made or caused to be made" false statements in required filings or broker-dealer registrations. See *id.* §§ 78o(b)(4)(A),

78u-2(a)(3), 78ff(a). None of these provisions creates a private right of action.

3. The PSLRA. In the PSLRA, Congress rejected proposals to overrule *Central Bank* and expand the scope of private civil liability under § 10(b) to secondary actors. Instead, in enacting § 20(e) of the 1934 Act, 15 U.S.C. § 78t(e), Congress expressly provided that aiders and abettors may be pursued *only* in actions brought by the SEC. Thus, Congress gave the SEC, but *not* private plaintiffs, an express claim for conduct ("substantial assistance") by defendants who had no duty to disclose. This legislative decision makes "unsupportable" a reading of the § 10(b) private cause of action that transforms most aiders and abettors into primary violators. *Stoneridge*, 552 U.S. at 162–63.

4. Sarbanes-Oxley. In the Sarbanes-Oxley Act, enacted in 2002, Congress again rejected proposals to allow private civil plaintiffs to sue secondary actors under § 10(b). Members of Congress proposed "to give the victims of fraud the right to sue those who aid issuers in misleading and defrauding the public." H.R. Rep. No. 107-414, at 53–54 (2002). Congress was urged to "undo the Central Bank case and bring back aiding and abetting." *H.R. 3763 – The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs.*, 107th Cong. 63 (2002). It was asserted that "when a person adds substantial value to a fraudulent course of conduct—in other words, contributes in a substantive way to its success—then liability is necessary and appropriate to achieve both deterrence and compensation." *Id.* at 485–86.

Congress rejected these proposals for expanding the § 10(b) implied private cause of action. Instead, Congress empowered *the SEC* to direct to share-

holders any proceeds it obtained from the secondary actors it sued under § 20(e). 15 U.S.C. § 7246(a). From 2002 to 2006, the SEC recovered $8 billion, including from aiders and abettors, for "Fair Funds" distributions to shareholders. See SEC, *2006 Performance & Accountability Report* 23 (Nov. 2006). More recently, the SEC has arranged numerous distributions of tens or even hundreds of millions of dollars to fund investors harmed by the practice of market timing.[5]

Congress's repeated decisions not to modify any part of *Central Bank* in private civil suits is at least "entitled to a good deal of weight." *Blue Chip Stamps*, 421 U.S. at 749. "It is the federal lawmaker's prerogative . . . [to] shape the contours of . . . § 10(b) private actions." *Tellabs*, 551 U.S. at 327. Legislative acquiescence in *Central Bank* is particularly strong because Congress has held "[e]xhaustive hearings" on the issue at various times, and none of the introduced bills has passed. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600–01 (1983).

5. Dodd-Frank. Finally, in the Dodd-Frank Act, enacted in July 2010, Congress was yet again importuned to reenact a private remedy for aiding

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[5] *See, e.g.*, Press Release, SEC Announces $79 Million Fair Fund Distribution in the Edward Jones Revenue Sharing Settlement (Apr. 26, 2007); Press Release, SEC Announces $30 Million Fair Fund Distribution to Investors Affected by Undisclosed Market Timing in RS Investments Mutual Funds (Apr. 25, 2008); Press Release, SEC Announces Fair Fund Distribution to Harmed Investors in Putnam Mutual Funds (Aug. 18, 2008); Press Release, SEC Announces Fair Fund Distribution to Investors Harmed by Market Timing in Franklin-Templeton Funds (Sept. 23, 2008); Press Release, SEC Announces $418 Million Fair Fund Distribution to Harmed Investors in Invesco Mutual Funds (Dec. 14, 2009).

and abetting. Such provisions were included in the original Senate version of the bill, in a stand-alone bill proposed in the Senate, and in a conference amendment proposed in the House.[6] But Congress declined to disturb the delicate balance previously struck, and instead instructed the U.S. Government Accountability Office to conduct a study of "the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws." This study includes "review of the role of secondary actors in companies issuance of securities," as well as a review of private securities litigation under the PSLRA and post-*Stoneridge* judicial decisions regarding secondary actors. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. IX, § 929Z, 124 Stat. 1376, 1871 (2010).

Moreover, Congress once again expanded *the SEC's* authority to bring aiding-and-abetting claims. The SEC may now pursue aiders and abettors of violations of the Securities Act of 1933 and the Investment Company Act of 1940. It may also impose monetary penalties against aiders and abettors under the Investment Advisers Act of 1940. *Id.* tit. IX, sec. 929M(b), § 48, sec. 929N, § 209, sec. 929O, § 20(e), 124 Stat. at 1861–62 (codified at 15 U.S.C. §§ 80a-48, 80b-9, 78t(e)). Finally, Congress expanded

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[6] S. 1551, 111th Cong. (2009); 156 Cong. Rec. S3569, S3618 (daily ed. May 12, 2010) (statement of Sen. Specter regarding Amendment No. 3776); Discussion Draft of Restoring American Financial Stability Act of 2009, § 984 (Nov. 10, 2009); Ronald D. Orol, *Dodd Unveils Bank Reform Bill Without GOP Support*, MarketWatch, Nov. 10, 2009; Press Release, Rep. Maxine Waters, Waters Wins Big for Consumers, Homeowners, Minorities and Shareholders in Wall Street Reform and Consumer Protection Legislation (June 30, 2010).

the private remedy under § 9(f) and the prohibitions under § 10 itself (§ 10(a), governing short sales, and a new § 10(c), governing stock lending and borrowing) to cover all non-government securities rather than just exchange-traded securities. *Id.* tit. IX, § 929L, 124 Stat. at 1861 (codified at 15 U.S.C. §§ 78i, 78j).

Congress did *not*, however, provide the remedy that plaintiffs are seeking—and the Fourth Circuit provided—in this case. The message is clear. Consistent with *Central Bank* and *Stoneridge*, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

VIRGINIA OFFICE FOR PROTECTION AND ADVOCACY,
Petitioner,

v.

JAMES W. STEWART, III, COMMISSIONER,
DEPARTMENT OF BEHAVIORAL HEALTH AND
DEVELOPMENTAL SERVICES OF THE
COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR AMICUS CURIAE RHODE ISLAND OFFICE OF THE CHILD ADVOCATE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex parte Young*.

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INTEREST OF AMICUS CURIAE

The Rhode Island Office of the Child Advocate ("Child Advocate") is an independent state agency that is required by state law to "take all possible action including... formal legal action, to secure and ensure the legal, civil, and special rights of children" involved with the Department of Children, Youth and Families of the State of Rhode Island ("DCYF"). R.I. Gen. Laws §§ 42-73-5, 42-73-7(6).[1] The Child Advocate's stated mission is "to protect the legal rights of children in State care and to promote policies and practices which ensure that children are safe; that children have permanent and stable families; and that children in [and] out of home placements have their physical, mental, educational, emotional, and behavioral needs met." Rhode Island Office of the Child Advocate, *Mission Statement of the Office of the Child Advocate*, at http://www.child-advocate.ri.gov/index.php (last visited Aug. 30, 2010). The Child Advocate strives to bring safety, security and, ultimately, permanency, into the lives of children in state care.

In pursuing its statutory mission, the Child Advocate has availed itself of the federal court system and sought declaratory and injunctive relief against state officials. This practice is consistent with the longstanding doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission.

Indeed, in 2004, a federal court recognized that a suit brought by the Child Advocate against the director of the DCYF "fit[] squarely within" the *Ex parte Young* exception to state sovereign immunity. *See Office of Child Advocate* v. *Lindgren*, 296 F. Supp. 2d 178, 188 (D.R.I. 2004).

The Fourth Circuit's erroneous ruling that a federal forum is not available to state plaintiffs seeking to enjoin state officials from violating federal law threatens the enforcement work of both the Child Advocate and other independent state agencies throughout the country. The Child Advocate submits this brief to offer the Court its perspective on how the Fourth Circuit's decision, though purporting to respect the dignity and sovereignty of states, actually frustrates the purpose of state legislative enactments like the ones that created the Petitioner (the Virginia Office for Protection and Advocacy or "VOPA") and the Child Advocate itself.

SUMMARY OF ARGUMENT

The decision below turned state sovereign immunity principles on their head, jurisdictionally restricting states in the name of respecting these same states. The Fourth Circuit held that the longstanding doctrine of *Ex parte Young*, 209 U.S. 123 (1908), is not available to states in circumstances where that same doctrine unquestionably would be available to private plaintiffs. This holding directly curtailed the enforcement powers of a state protection and advocacy agency established by the Commonwealth of Virginia, and it endangers the work of other state-created agencies like the Child Advocate of Rhode Island.

This Court has described the purpose of "[t]he principle of sovereign immunity" as "'accord[ing] the

States the respect owed them as members of the federation,'" *Alden* v. *Maine*, 527 U.S. 706, 748-49 (1999) (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). The Fourth Circuit's decision did the opposite. The Child Advocate respectfully argues that the decision below should be reversed.

ARGUMENT

I. Rhode Island And Other States Chose To Create State Agencies With The Power To Sue State Officials In Federal Court—And Affirming The Fourth Circuit's Decision Would Negate That State Choice

The Child Advocate is empowered by the State of Rhode Island to safeguard vulnerable children in Rhode Island, and it has done so in part by bringing federal claims against state officials in federal court. If affirmed, the Fourth Circuit's decision would remove powers that agencies like the Child Advocate and VOPA have properly been given by their states.

A. The Rhode Island Office Of The Child Advocate

Understanding the potential impact of the Fourth Circuit's decision on the Child Advocate must begin with an examination of the authorization, purpose, and powers of the Child Advocate—all of which reflect choices made by Rhode Island as a state sovereign.

1. Establishment and purpose of the Child Advocate

"The Office of the Child Advocate was enacted by statute to protect the civil, legal and special rights of all children involved with the Department of Children

Youth and Families." *See* Office of the Child Advocate Annual Report, *Children—Why We Care* 7 (2008-2009), Public Document No. 09-01, *available at* http://www.child-advocate.ri.gov/documents/2008-2009%20OCA%20Annual%20Report-3.pdf ("2009 Annual Report"). Rhode Island created the Child Advocate in 1979 in response to the findings of a study commissioned by the General Assembly to examine the needs of the child welfare system. *See* Finn & D'Ambra, *Lawyering for Children in the Care of the State*, 42 R. I. Bar J. 7, 7 (Mar. 1994); *see also* 1979 R.I. Pub. Laws 911.

Rhode Island was the first state to legislatively enact an ombudsman-like office devoted to child welfare. Davidson et al., *Establishing Ombudsman Programs for Children and Youth: How Government's Responsiveness to Its Young Citizens Can Be Improved* 65 (ABA Center on Children and The Law 1993)[2] The American Bar Association identified the Child Advocate as a model child welfare ombudsman program, (*id.* at 98), and it "is often cited as one of the most successful child welfare ombudsman programs in the United

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[2] The term "ombudsman" is a Swedish word dating back to the 19th century which literally means an investigator of "citizen" complaints. *Id.* at vi. The primary functions of a child welfare ombudsman are to "address complaints related to government services for children and youth, to provide a system accountability mechanism, and to protect the interests and legal rights of children and their families who are parties in the child welfare and juvenile justice arenas." D'Ambra, *Appendix E: Survey of Ombudsman Offices for Children In the United States*, *in* United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody* (Jan. 1998), at E1, *available at* http://www.ncjrs.gov/pdffiles/164727.pdf.

States." Marzick, *The Foster Care Ombudsman: Applying An International Concept to Help Prevent Institutional Abuse of America's Foster Youth*, 45 Fam. Ct. Rev. 506, 515 (July 2007). Other states have modeled their own similar programs after the Child Advocate. *See, e.g.*, D'Ambra, *Commentary: What The Child Advocate Does*, Providence Journal-Bulletin, Feb. 17, 2000, at 7B; D'Ambra, *Appendix E: Survey of Ombudsman Offices for Children In the United States*, *in* United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, at E-1 (Jan. 1998), http://www.ncjrs.gov/pdffiles/164727.pdf.

2. Duties and responsibilities of the Child Advocate

"Under Rhode Island law, the Child Advocate is endowed with the responsibility of protecting the interests and rights of children who are placed under DCYF custody." *Sam M. ex rel. Elliott* v. *Carcieri*, 608 F.3d 77, 82 (1st Cir. 2010). The Child Advocate is appointed by the Governor. R.I. Gen. Laws § 42-73-2. Funding for the Child Advocate is appropriated annually by the General Assembly. *Id.* § 42-73-4. The Advocate "acts independently of the department of children, youth, and families in the performance of his or her duties." *Id.* at 42-73-5.

The Child Advocate's statutory duties include:

- ensuring that children involved with DCYF are apprised of their rights under Rhode Island law;
- conducting periodic inspections of DCYF residential facilities and their practices;

- reviewing DCYF policies and procedures that implicate children's rights, and making recommendations regarding legislative reform;
- investigating a wide variety of complaints alleging neglect or abuse, including reports of institutional abuse;
- investigating all fatalities among children that have received DCYF services; and
- providing training and assistance to guardians *ad litem* in Family Court and reviewing Family Court orders relating to juveniles.

R.I. Gen. Laws §§ 42-73-7, 42-73-9.1.[3]

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[3] In a given year, the role of the Child Advocate encompasses a broad spectrum of matters. For example, in 2008-2009, the Child Advocate conducted public education and outreach campaigns to promote public awareness of issues impacting children and also to ensure that children in state care were apprised of their rights. *See* 2009 Annual Report 11. The Advocate participated in policy reviews and legislative initiatives involving issues affecting Rhode Island's children and families, and served on various governmental and non-governmental boards and advisory panels tasked with proposing and reviewing potential changes in the law. *Id.* at 11-12, 17. The office investigated institutional abuse allegations and other complaints of abuse or neglect, sometimes at the direction of the Family Court, *id.* at 13-15, and inspected the facilities and procedures of various institutions or residences, licensed or unlicensed, where a child had been placed by the Family Court or DCYF, *id.* at 16. The Advocate also administered the state's Victim's Services fund, and although it was not statutorily required, served as a guardian ad litem for children voluntarily placed in the care of DCYF. *Id.* at 19-21. Finally, the Advocate pursued federal class action litigation on behalf of youth in state care. *Id.* at 19.

In addition to these specifically-enumerated duties, Rhode Island has also broadly directed the Advocate to "*[t]ake all possible action* including, but not limited to, programs of public education, legislative advocacy, and *formal legal action*, to secure and ensure the legal, civil, and special rights of children subject to the provisions of § 42-73-9.1 and chapter 72 of this title." R.I. Gen. Laws § 42-73-7(6) (emphases added). In furtherance of these duties, the Child Advocate is entitled to access a variety of DCYF, family court, law enforcement, and other agency records, over which it also has subpoena power, and to freely and confidentially communicate with any child receiving state services. *Id.* §§ 42-73-8 to -10.

3. The Child Advocate and the courts

"Probably the most powerful tool of the Child Advocate is the ability to bring legal action ... to ensure that the rights of children are observed by DCYF." Davidson, *supra*, at 66. To fulfill its statutory mandate, the Child Advocate has engaged in litigation in state and federal courts. *See, e.g., id.* at 97-98, 116-117; Finn & D'Ambra, *supra*, at 10-11. For example, in 1982, the Child Advocate brought suit in federal court against the directors of DCYF and the state Department of Education to ensure that children without parents to represent them in special education matters were afforded an educational advocate in accordance with the provisions of 20 U.S.C. § 1415(b)(1)(A)-(E) (1976). *See* Finn & D'Ambra, *supra*, at 11 & nn.46-49 (describing *Office of the Child Advocate* v. *Pontarelli*, C.A. No. 82-0091P (D.R.I.)). Consent decrees were entered in 1983 and 1989 laying out the scope of the Departments' legal duties. *Id.*

In 1986, the Child Advocate brought a landmark suit against the director of DCYF in federal court, asserting both federal constitutional claims and statutory claims under the Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 620 & 670 *et seq.* *See Office of Child Advocate* v. *Lindgren*, 296 F. Supp. 2d 178, 181-182 (D.R.I. 2004). The Child Advocate alleged that DCYF had instituted a practice of placing children under state care in residences without regard to the children's needs, and moving them nightly until finally placing them in more stable placements. *Id.* In addition to these "night-to-night" placements, the Complaint alleged that DCYF failed to provide the children with other needed services and suitable placements, and sought declaratory and injunctive relief. The court entered a consent decree in 1988, which was subsequently amended in 1989 and then again 2001. *Id.*

In 2002, the Child Advocate moved to hold the DCYF director in contempt, citing her continuing noncompliance with the decree. In response, DCYF moved to dismiss the complaint and asked the court to relieve DCYF of its obligations under the consent decree, arguing, *inter alia*, that DCYF enjoyed sovereign immunity. 296 F. Supp. 2d at 182, 187. The district court denied DCYF's motion in its entirety and held that since the Advocate had sued a state official seeking declaratory and injunctive relief, the suit fit "squarely" within the doctrine of *Ex parte Young*. *Id.* at 188; *see also id.* ("The *Ex parte Young* exception simply stated is that the Eleventh Amendment does not bar a suit for prospective injunctive relief against a named state official for ongoing federal law violations."). In fact, the court rejected a *Couer d'Alene* argument similar to that relied on by the Fourth Circuit in this case, stating that Rhode Island's "interest in the administration of its

child welfare system ... [did] not rise to the level of a special sovereignty interest" that would justify a new exception to *Ex parte Young*. *Id.* at 188-189.

B. The Child Advocate, Like State-Operated Protection and Advocacy Agencies, Would Be Adversely Affected By The Fourth Circuit's Rule

As explained in VOPA's merits brief (at 2-11), the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 15043(a)(2)(A)(i)) ("DD Act") and the Protection and Advocacy for Individuals with Mental Illness Act (42 U.S.C. § 10805(a)(1)) ("PAIMI Act"), were enacted to ameliorate the deplorable conditions at state-operated facilities for individuals with developmental disabilities and psychiatric conditions, respectively. *See, e.g., Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 494 (11th Cir. 1996) (stating that the DD Act was a response to "inhumane and despicable conditions" at a state facility for the developmentally disabled); S. Rep. No. 99-109 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1361, 1361 (noting that PAIMI Act resulted from inquiry into state-operated psychiatric facilities). Many states and territories, including Virginia, have freely chosen to establish independent state agencies to carry out the protection and advocacy functions.[4]

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[4] The states and territories that have established state agencies to carry out the protection and advocacy functions include: Alabama (established by unpublished Governor's directive), American Samoa (Am. Samoa Code Ann. c. 14, §§ 4.1401 *et seq.*), Connecticut (Conn. Gen. Stat. §§ 46a-7 *et seq.*), Indiana (Ind. Code §§ 12-28-1-1 *et seq.*), Kentucky (Ky. Rev. Stat. Ann. §§ 31.010 *et seq.*), New York (N.Y. Mental Hyg. Law §§ 45.01 *et seq.*), North

Much like the state P&A systems, the Child Advocate was established to serve one of the state's most vulnerable populations. And like the state P&A agencies, the Child Advocate is empowered to take legal action in order to do so. R.I. Gen. Laws Ann. § 42-73-7(6). If the question presented by this case—"[w]hether the Eleventh Amendment *categorically precludes* an independent state agency from bringing an action in federal court against state officials ... under the doctrine of *Ex parte Young*"—is answered in the affirmative, the Child Advocate, like VOPA and every other state agency in this country, would be barred from bringing federal claims against state officials in federal court, even though Rhode Island chose to give it that power.

Such a result would undermine a core purpose of the Child Advocate—to serve as an independent ombudsman reviewing state officials' treatment of children, to ensure full compliance with federal and state law. As the United States emphasized in its brief in support of certiorari, the Fourth Circuit's decision "overlooked a key feature" of the DD and PAIMI acts, pursuant to which the P&A systems were created: namely, that the Acts require that the state-agency P&A systems "must sometimes take an adversarial position vis-à-vis other state entities." Br. 14 (citing 42 U.S.C. §§ 10805(a)(2), 15043(a)(2)(G), 15044(a)). Just so, the Child Advocate must sometimes hold other state agencies—notably, DCYF—accountable for ongoing violations of the state and federal rights of children. *See, e.g., In re R.J.P.*, 445 A.2d 286, 288 (R.I. 1982)

Dakota (N.D. Cent. Code §§ 25-01.3-01 *et seq.*), Ohio (Ohio Rev. Code Ann. §§ 5123.60 *et seq.*), Puerto Rico (P.R. Laws Ann. tit. 3, ch. 24A, §§ 532 *et seq.*), and Virginia (Va. Code Ann. § 51.5-29.2A).

("[T]he legislature has specifically stated that the Child Advocate in performing his duties, one of which is the bringing of formal legal action on behalf of children, must act independent of DC[Y]F"); Davidson, *supra*, at 65 ("The most important aspect of the Child Advocate's role, as set out by the enabling legislation, is the independence of the office.")

The choice to create the Child Advocate, and to vest it with the power to litigate against state officials as necessary, was made by the state of Rhode Island itself—yet the Fourth Circuit's theory would repudiate this choice, in the name of state's rights. This reasoning is self-defeating and runs counter to longstanding doctrine, as discussed below.

II. The Fourth Circuit Ruling Demeans State Sovereignty By Disadvantaging States As Compared To Private Plaintiffs, Contrary To Precedent

Because the Fourth Circuit's rule treats state agencies as inferior to private parties in their ability to invoke *Ex parte Young*, it conflicts with the animating purpose of sovereign immunity: respecting the dignity of states. At bottom, the Fourth Circuit's decision requires states that wish to empower state agencies to enforce prospective compliance with federal law—like Virginia and Rhode Island have done, with VOPA and the Child Advocate—to enact waiver provisions of the sort that traditionally have been necessary only for authorizing suits for damages. If this Court agrees with the Fourth Circuit, the result would upset legislative choices made by states, the avowed beneficiaries of state sovereign immunity. This backwards result is contrary to a hundred years of precedent.

A. VOPA's Suit Is Permitted Under *Ex Parte Young*

Until this case, a state would have no reason to enact a waiver provision in the circumstances present here. This is because such waivers of sovereign immunity are, under this Court's prior Eleventh Amendment decisions, relevant only to *damages* suits. *See, e.g.*, *Kentucky* v. *Graham*, 473 U.S. 159, 169 (1985) ("absent waiver by the State or valid congressional override, the Eleventh Amendment bars a *damages* action against a State in federal court" (emphasis added)). Waivers are unnecessary for suits for *injunctive* relief, under the century-old rule of *Ex parte Young*, which holds that a suit against a state officer, seeking prospective compliance with federal law, is not to be treated as a suit against the state. As this Court held, "[T]he use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159-160. [5] The purpose is simple: to "ensure[]

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[5] *See also Green* v. *Mansour*, 474 U.S. 64, 68 (1985) ("The landmark case of *Ex parte Young* created an exception to [sovereign immunity] by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State."); *Graham*, 473 U.S. at 169 n.18 ("In an injunctive or declaratory action grounded on federal law, the State's immunity *can* be overcome by naming state officials as defendants."); *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978) ("[T]he Court held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials[.]"); *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304 (1952) ("This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State."); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Petitioner's right to maintain this action in a federal court

that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The *Ex parte Young* logic and holding applies with equal force where the state is the plaintiff, and the Fourth Circuit erred by holding otherwise.

Indeed, precedent dictates that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to a suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (alteration in original, internal citation omitted). Here, that "straight-forward inquiry" compels the conclusion that VOPA's suit can proceed: it alleges an ongoing violation of federal law and seeks

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depends[,] first, upon whether the action is against the State of Indiana or against an individual.... Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."); *Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932) ("The suit is not against the state. The applicable principle is that, where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief."); *Truax* v. *Raich*, 239 U.S. 33, 37 (1915) ("As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of state, are about to proceed wrongfully to the complainant's injury ... it is established that the suit cannot be regarded as one against the state.")

prospective relief. The sovereign-immunity analysis should have ended there.

B. The Fourth Circuit Wrongly Departed From This Court's Sovereign Immunity Precedent

The Fourth Circuit's primary justification for not applying *Ex parte Young*—the alleged "intramural exception"—lacks any support in prior precedent. By treating VOPA as having less ability to invoke *Ex parte Young* than a private plaintiff, the Fourth Circuit departed from the letter and the purpose of long-standing doctrine set out by this Court. Again, the articulated rationale for state sovereign immunity is respecting the dignity of states, and where—as here—a state has chosen to vest a state agency with the authority to sue state officials to enforce prospective compliance with federal law, that state choice deserves respect.

1. No "intramural exception" applies

The Court of Appeals found *Ex parte Young* inapplicable, on the ground that this suit presents an "intramural state dispute," *Virginia* v. *Reinhard*, 568 F.3d 110, 113 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 3493 (2010) (No. 09-529), or "intramural contest," *id.* at 119, or "internecine feud," *id.* at 121, in which the plaintiffs seek "to turn the State against itself," *id.* at 120, 121, and have a federal court "referee contests between [state] agencies," *id.* at 121. But *Ex parte Young* makes clear that the state is not a defendant in this suit. VOPA seeks to enforce federal requirements against individual state officers who have allegedly deviated from these binding requirements. The suit presents a contest between VOPA and allegedly law-

breaking individual defendants—not the state against "itself."

Correctly identifying the defendant in this case removes the false premise supporting the court of appeals' decision, and with this premise removed the decision collapses. No decision of this Court bars a state protection and enforcement agency from carrying out its state-authorized mission of suing individuals who violate federal (and state) law and thereby harm vulnerable state citizens.

Indeed, the decision below cited no precedent explicitly recognizing an "intramural" exception to *Ex parte Young*. Instead, the court of appeals sought to extrapolate this exception from loose language and unrelated holdings. This effort fails—the cited cases do not support the new rule the Fourth Circuit attempts to extract from them.

To begin, this Court's decision in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 258 (1997) recognized only that in certain unusual circumstances, the nature of the *relief* sought against a state-official defendant may be qualitatively different from conventional injunctive relief, such that the *Ex parte Young* rule may not apply. *See, e.g., id.* at 281-282 (barring suit seeking title to state land). The instant case does not present such an unconventional request for relief: the Fourth Circuit itself recognized that a private plaintiff could invoke *Ex parte Young* in precisely the circumstances present here. *See Reinhard*, 568 F.3d at 119 ("*Ex parte Young* would permit this action if the plaintiff were a private person, or even a private protection and advocacy system."). *Coeur d'Alene* is thus inapposite.

Equally inapposite are several cases involving municipalities in which the Court rejected plaintiffs' claims

as a matter of substantive law. *See Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (plaintiff has no federal constitutional rights against state); *City of Trenton* v. *New Jersey*, 262 U.S. 182, 191 (1923) ("no substantial federal question is presented"); *Stewart* v. *City of Kansas City*, 239 U.S. 14, 15 (1915) ("no Federal question was raised"); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 179-180 (1907) (no violation of federal law); *Reinhard*, 568 F.3d at 122 (plaintiffs in those cases "could not obtain relief under federal law"). This Court determined as a matter of substantive law that no federal rights were violated in those four disputes and did not hold, as a jurisdictional matter, that otherwise-well-pleaded claims were jurisdictionally barred from federal court under sovereign-immunity principles.

These cases are both irrelevant to the Fourth Circuit's jurisdictional holding, and distinguishable on their own terms—as VOPA plainly pleaded an actionable claim for access to records improperly withheld by individual state officials. *See, e.g., Protection & Advocacy for Persons with Disabilities* v. *Mental Health & Addiction Servs.*, 448 F.3d 119, 121 (2d Cir. 2006) (Sotomayor, J.) ("[W]e hold that PAIMI unambiguously grants OPA [a state protection and advocacy agency] access to peer review records and affirm the district court's entry of a declaration and injunction requiring the Department to disclose to OPA the peer review records" regarding two deaths); *Pennsylania Prot. & Advocacy, Inc.* v. *Houston*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.) (PAIMI "requires that an organization such as a PP & A be given access to peer review reports such as those at issue [regarding patient's death] irrespective of state law"); *Alabama Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 499 (11th Cir. 1996) enjoining defendant from

failing to release records to state protection and advocacy program). Indeed, the court of appeals stated that "VOPA can enforce federal law in state court," *Reinhard*, 568 F.3d at 124, but failed to recognize that the existence of an enforceable federal right is inconsistent with every case it cited for the "intramural" rule.

Nor is the Fourth Circuit's intramural exception—used here to divest a federal court of hearing a case raising a claim seeking *prospective* compliance with *federal* law—supported by decisions addressing *damages* requests (*Alden* v. *Maine*, 527 U.S. 706 (1999)) or injunctions seeking to enforce *state* law (*Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984)), and the Circuit erred by relying on such authority.

2. The state choice to authorize suits by a state plaintiff is consistent with state sovereignty

Not only is the Fourth Circuit's decision unsupported by the holdings of the cited cases, it is also inconsistent with the theme of these decisions: respecting state sovereigns. The Circuit's articulated justification for its decision—*i.e.*, to protect the states from "excessive federal meddling with their internal authority"—runs aground on the simple fact that here Virginia itself chose to vest VOPA with the authority to litigate federal claims in federal court; again, this state choice is entitled to respect, and distinguishes this case from cases such as *Alden* and *Pennhurst*.[6]

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[6] When a defendant state official who is sued under *Ex parte Young* asserts state sovereign immunity as a bar to suit, this self-interested litigation defense is not a relevant "state choice"—the critical state choice is the creation of state agencies that are em-

Since the founding, the ability to bring a suit as a plaintiff has been understood as component of state sovereignty, not a threat to sovereignty. *See* 3 *Debates on the Federal Constitution* 556 (J. Elliot 2d ed. 1854) (John Marshall stating "I see a difficulty in making a state defendant, which does not prevent its being plaintiff"), *quoted in Alden*, 527 U.S. at 718 (1999). In its standing decisions, this Court has confronted directly the comparison between state plaintiffs and private plaintiffs and held that sovereignty entitles state plaintiffs to "special solicitude" when they seek access to federal courts—which is exactly the opposite of how the Fourth Circuit treated a Virginia state agency. *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007); *see also id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not ... a private individual.").

Indeed, the Fourth Circuit's decision cannot be reconciled with the basic principle that "[a]t the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico, ex rel., Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., joined by Marshall, Blackmun, Stevens, JJ., concurring) (emphasis in original)). By installing a new procedural impediment to states exercising the right to sue, the Fourth Circuit undermined the very sovereigns it professed to protect.

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powered to bring *Ex parte Young* suits in federal court. If a defendant state official believes that the state legislature did not make this choice—*i.e.*, did not statutorily authorize state agencies to bring *Ex parte Young* suits—such official may move to dismiss on this ground. But that is an issue of interpreting state law, not the federal constitution.

3. *Ex parte Young* makes no distinction between individual and state plaintiffs

In the end, the Fourth Circuit's critical doctrinal error was creating a rule based on the character of the *plaintiff*—when precedent focused on the character of the *relief* sought. As noted above, the Fourth Circuit conceded that a private plaintiff could bring suit here—but not, according to the Circuit, a state plaintiff. To support this discrimination against state plaintiffs like VOPA, the court of appeals cited isolated statements in two Supreme Court footnotes: *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.14 (1996) ("an *individual* can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law) (emphasis added); *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 n.9 (2001) (referring to *Ex parte Young* suits by "private individuals"). From these references, the court of appeals concluded that a private, individual plaintiff limitation was a "basic element" of *Ex parte Young* doctrine. *Reinhard*, 568 F.3d at 118.

Not so: these footnotes refer to the use of *Ex parte Young* by "individuals" for the simple reason that sovereign immunity concerns have typically arisen in the context of private suits against states, and the decisions thus spoke of the need to protect states against the "indignity" of being sued in certain circumstances without their consent. *See, e.g.*, *Ex parte Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties."); *Hans* v. *Louisiana*, 134 U.S. 1, 13 (1890) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."). But nothing in these

decisions—or their supporting rationale—limits states as plaintiffs, and the Circuit's wooden reading of the language in these cases subverts their basic goal of safeguarding the dignity and sovereignty of states. If a state chooses to make its officials subject to an *Ex parte Young* suit in federal court by a state agency, state sovereign immunity is no bar to such a suit.[7] To the contrary, "respecting states" requires respecting the state choice to make its officials amenable to suit—not contorting the *Ex parte Young* cases to limit their application to private plaintiffs.

Indeed, if the court of appeals were correct that a limitation to private plaintiffs were "a basic element of the [*Ex parte Young*] doctrine," *Reinhard*, 568 F.3d at 118, then the Supreme Court's extensive and divided analysis in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 258 (1997) would have been unnecessary because the plaintiff was not a private plaintiff but a sovereign tribe, a party analogous to a sovereign state. *See id.* at 268. Instead of resolving the case by reference to the plaintiff's identity, however, this Court held that the outcome depended on "the difference between the *type of relief* barred by the Eleventh Amendment and that permitted under *Ex parte Young*." *Id.* at 281 (emphasis added); *see also Verizon Md., Inc.*, 535 U.S. at 645 ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into

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[7] This choice need not be expressed as a "waiver"—again, under this Court's state sovereign immunity cases, waiver is necessary only for damages claims, and states thus have had no legal need to draft statutory provisions using waiver language, where the only intended federal suits against state officials are *Ex parte Young* suits.

whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.").

As the *en banc* Seventh Circuit explained in rejecting the Fourth Circuit's analysis in a parallel case, "the threshold problem with these arguments is that the *Ex parte Young* doctrine focuses on the identity of the defendant and the nature of the relief sought, not the nature of identity of the plaintiff." *Indiana Protection & Advocacy Servs.* v. *Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) (en banc), *petition for cert. filed*, 79 U.S.L.W. 3063 (U.S. July 21, 2010) (No. 10-131).

The critical *Ex parte Young* question is this: is the relief requested either conventional damages or another remedy that implicates damages-like considerations (in which case *Ex parte Young* does not apply) or rather is injunctive relief (in which case *Ex parte Young* applies)? This is the requisite "straightforward" inquiry which the Fourth Circuit failed to conduct. The Fourth Circuit instead pursued a separate inquiry—who seeks the relief?—that both lacked precedential support and effectively undermined the very beneficiaries of state sovereign immunity: states.

CONCLUSION

The decision of the Fourth Circuit should be reversed.

Respectfully submitted.

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